## TABLE OF CONTENTS


| | Page |
|---|---|
| Statement of the Case | 2 |
| Questions Presented for Review | 3 |
| Certificate of Service | 16 |

IN THE

# SUPREME COURT OF THE UNITED STATES

**NO. 73-1919**

FAIRVIEW NURSING HOME,
*Petitioner*

VS.

NATIONAL LABOR RELATIONS BOARD,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI

Comes the Petitioner in the above styled cause, and represents and shows to your Honors that the disposition of said case pursuant to Rule 21 of the U.S. Court of Appeals for the Fifth Circuit holding, in effect, "that the Order of the Administrative Agency is supported by substantial evidence on the record as a whole," clearly denies the Petitioner, Esther J. Johnston, of due Process of Law under Section 1, of the 14th Amendment to the U.S. Constitution, for the decision fails to consider the documented merits of the Petitioner's cause, which if duly considered by this Honorable Court would clearly require a different result in the Case at Bar.

## JURISDICTION

The Basis for Federal Jurisdiction in the Federal Court of first instance is that Section 10 (f) of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U. S. Code Sec. 151 et seq.) provides that any person aggrieved by a Final Order of the Board may obtain a review of such Order in the Circuit Court of Appeals, and the

U. S. Supreme Court is herewith requested to Review the Record and the Decision of the Circuit Court of Appeals by this Petition for Writ of Certiorari.

Besides the errors of law which glare back at the Reviewer of this record, there is the precedential value of this Court's exercising its power of supervision over the National Labor Relations Board which in this Case has so far departed from the accepted course of Judicial Proceedings that the Petitioner Employer has been systematically denied her lawful rights and faces great financial loss and injustice by the enforcement of the subject Order of the National Labor Relations Board by the Court of Appeals.

## STATEMENT OF THE CASE

This case was before the Fifth Circuit Court of Appeals upon the petition of Fairview Nursing Home to review and set aside, and on cross application by the National Labor Relations Board to enforce, an order of the Board issued on March 9, 1973. The Board's Decision and Order (A. 865-866) [1] are reported at 202 NLRB No. 49, and comes to the Supreme Court by the Appellant, Esther J. Johnston, who is the Lessor and former operator of the Fairview Nursing Home on her Petition for a Writ of Certiorari to review the record of the instant Case in which the U. S. Court of Appeals for the Fifth Circuit by its opinion on December 12, 1973, and its Judgment entered on January 11, 1974 has ordered the enforcement of said Order of the National Labor Relations Board, and which opinion and Judgment are Appended hereto together with the Clerk's letter advising that Rehearing was denied dated March 11, 1974, and the Order whereby Mandate was Stayed to April 21, 1974 for the filing of the Petition For Writ of Certiorari to the Supreme Court.

In this same Case, on February 25, 1974—on Application for Review of an Order of the National Labor Rela-

tions Board (Georgia Case) before Thornberry, Goldberg and Roney, Circuit Judges, By the Court:

"It is Ordered that Appellant's Motion to Supplement the Record en banc, filed in the above styled and numbered Case is hereby GRANTED." (A copy of said Order is Appended hereto together with the Motion to Supplement the Record en banc.)

Whereas, nearly two months after the clerks of the Fifth Circuit have issued and distributed the printed opinion of the Enforcement of the Order of the National Labor Relations Board on December 12, 1973, and entered the Judgment prepared by the National Labor Relations Board on January 11, 1974, *A three Judge Panel of that Court issues its Order on February 25, 1974, granting Appellant's Motion to Supplement the Record en banc* with documented evidence that clearly refutes the findings of the National Labor Relations Board and lawfully bars the Enforcement of their Decision and Order which is no longer supported by the credible evidence of the Record.

## QUESTIONS PRESENTED FOR REVIEW

The following questions are respectively presented for Review by this Honorable Court:

1. Is the U. S. Circuit Court of Appeals for the Fifth Circuit in error to allow its Order for Enforcement of January 11, 1974 to stand in force and effect, when the Evidence included in the Record by the Court on February 25, 1974 in granting the Appellant's Motion to Supplement the Record en banc clearly reveals that the Decision and Order of the National Labor Relations Board is no longer supported by credible evidence of the Record.

(The question was timely raised by Motions to Adduce Additional Evidence, Motion To Remand and the Motion for Leave to File a Second Petition for Rehearing.)

2. Have lawful Charges of Unfair Labor Practices been filed against the Petitioner, Esther J. Johnston, when the Charges and Complaints name "Fairview Nursing Home", a non-entity as the Employer and Respondent, and indicating an Action in rem against the nursing home, when the Labor Management Relations Act, as amended, and the Rules and Regulations and Statements of Procedure, subpart B, Sec. 102.12 provides: "Such Charge shall contain the following (c) The full name and address of the person against whom the Charge is made (hereinafter referred to as the Respondent)" and intending an Action in personam. As the Act requires that the Federal Rules of Civil Procedure will apply to subject Proceedings, and Rule 17, thereof (a) declares that "Every Action shall be prosecuted in the name of the real party in interest," How could the Complaint by lawfully issued in this Case on May 18, 1972, when the named Labor Organization, the Public Employees Organizing Committee filing the Charges and named as the Petitioner in the Complaint became defunct and ceased to exist on April 26, 1972?

(Res. Ex. #4 App. 116) (Question was timely raised by Petition and Brief to U. S. Ct. of Appeals)

3. Was the Board in error in finding "that each party was afforded a full opportunity to be heard"? As said requirement was violated by the Regional Director, the Boards' Representative in Washington and the Hearing Examiner in their failure to grant the Respondent's Motion for a continuance (Respondent's Exhibit #3 and 3A)

(Question was timely raised by written Motion App. 102, 105 and Exception App. 179)

4. Was the Board in error by its Administrative Trial Judge's Denial of Respondent's Motion to Dismiss the entire proceeding? (Ref. Respondent's Exhibit No. 1.)

(Question was timely raised by written Motion App. 97 and Exception App. 149-168, 179)

(Ref. Res. Ex. #1) "May it please the Court, that the Employer files herewith a Motion To Dismiss the entire proceeding. Comes the Employer in the above styled cause, by and through her Attorney, and moves the Board to dismiss the petition heretofore filed therein and for grounds for said Motion assign the following:

The Petitioner as shown in the primary case is defunct, it no longer exists.

Whereas said Petitioner is defunct and no longer exists, and no separate Complaint duly investigated has been issued by the Board for any other lawful Petitioner, said case No. 10-Ca-9482 should be lawfully dismissed immediately.

By his own language General Counsel has conceded that the Petitioner in this case is defunct and no longer exists. And we accept his admission for the record." (R. 4-5)

5. Was the Board in error by its Administrative Trial Judge's finding that, Public Employees Organizing Committee, herein referred to as the Union is and has at all times material herein, a labor organization within the Meaning of the Act section 2 (5) of the Act. (Page 4 of the Findings) (R 4-19) (R 360-362) (General Counsel's Exhibit No's. 10 thru 52).

(Question was timely raised by Exception to Administrative Trial Judge's Findings App. 149-169 and by Petition and Brief to U. S. Ct. of Appeals)

Justice requires that the lawful status and legal identity of the original Petitioner, bringing Unfair Labor Charges and the authorization of that Union's Representation of the employees of the employer, must be and remain valid and in existance and in force and effect—from the time of the filing of said Unfair Labor Charges to the final Decision of the N. L. R. B. and the Judicial Review by the U. S. Court of Appeals—and the Supreme Court in order to provide lawful responsibility for the Labor Organiza-

tion's actions—lawful inquiry into their identification—verification of their representation of employees—availability of witnesses, and records to test the validity of the findings of the N.L.R.B.—and to test the lawful status of the charging parties and the truthfulness of their testimony before the Board. Otherwise, as in the Case at Bar, the original Petitioner, bringing the Unfair Labor Charges, is defunct, and the pretended Representation of the former employees of this former employer is invalid.

The employer is out of business, and no longer an employer of employees, and the N.L.R.B. continues to hold the reins of this dead horse, while arbitrarily parading unlawful demands for enforcement of an erroneous decision of the N.L.R.B. on behalf of a defunct and a non-existant Labor organization.

6. Was the Board in error by its Administrative Trial Judge's "Denial of Motion to separate witnesses" for it denied Employer right of cross examination, thereby Examiner denied Employer's Constitutional Right of Counsel, for denial of reasonable opportunity for discovery of truth by cross examination, when all witnesses are present, and continuously informed of preceeding testimony, their own testimony is modified, particularly when frequent recesses provided periods of consultation between previous and future witnesses together with their leaders and General Counsel, resulting in a Mokery of a Trial and a Hearing before the N. L. R. B. is reduced to the level of a Kangaroo Court? The first and primary object of cross-examination is its use as a vehicle for securing admissions of facts that tend to prove the Lawyer's Contentions or to corroborate proof of his claims already in the Record. The second object of cross-examination is to discredit opponents witnesses or their stories by the impeachment of those witnesses or their stories. The right to cross-examine a witness is absolute. (In re Culbergs Estate, 146 Pac. 888, 169 Cal. 365, People v. Andrews, 158 N. E. 462, 327 Ill.

162; Com. v. Gallo 175 N. E. 718, 275 Mass. 320, Warwick v. Moore County 291 S. W. 950 (tex.) Petitioner's Motion to Exclude, should have been granted so that each witness will not hear what the other witnesses testify. Motion should be granted prior to Opening Statements to prevent witnesses from knowing what the evidence will show, so as not to fore-warn them as to what to expect on cross-examination. If the witnesses are excluded as early as possible it will eliminate the possibility of changing their stories and allowing all the witnesses to remain in the Hearing as in this Case warns and permits the next witness to change his story whenever he finds it convenient or necessary to do so.

A Motion to exclude should always be granted where one side has the greater number of witnesses, as in the Case at Bar with many employees and only one employer. Excluding the witnesses serves to emphasize the lack of truth and credence to be given to a number of witnesses who take the stand and testify to the same thing in identical language, showing a carefully rehearsed and memorized story. Although the Motion to Excludee does not normally apply to the party Plaintiff or party Defendant, as in the instance of an organization such as the Public Employees Organizing Committee in the Case at Bar the Motion was properly addressed to the Court to have one representative to remain in Court to act in an advisory capacity to Counsel. However, to allow all members of the organization who expect to be witnesses to remain in Court was gross error, and extremely prejudicial to the rights of the employer, particularly when such witnesses testimony goes directly to the Matter in Controversy, as to whether or not the employer fired all of the card signers?

(Question was timely raised by Motion and Exception App. 179-187)

(Ref. R. 27-28) Employer's Counsel: "For the record, we move at this time to invoke the rule to separate the

witnesses who are present. We are aware and cognizant of the Court's qualified opinion that the witnesses present are interested in the monetary outcome of this proceeding. However, the primary issue is the credibility of these witnesses. They have been talked to, prepared on numerous occasions by opposing Counsel. The parties have been prepared for appearances on the issues and the questions before this Court. The past week was spent by opposing Counsel, both of them, in picking statements and telling these people what they expect to prove by them. The only opportunity of the Employer is the right of cross-examination which will be virtually destroyed if 40 witnesses are put before Your Honor all stating the same testimony. The problem, well, it would be violative of her right of Counsel under the statute, depriving her of this. We feel that Public Employees Organizing Committee or someone is being represented by Mr. Alex Hurder here. We feel that is along with the nonpartisan view of General Counsel. We feel they are adequately represented. And with the overall protective guidance of your Honor, we feel that the parties here are going to be protected and witnesses are going to be protected. And the credibility of the statements before Your Honor are the primary thing of interest here. It is the essence of the case. You parade 40 witnesses or so before Your Honor each hearing and answering questions that have been rehearsed by the General Counsel for the week preceding this hearing, the opportunity for cross-examination by the Employer's Counsel is destroyed and my client is deprived of Counsel under the constitution and the Act here." (R. 30-31) "Judge: I anticipate to weigh the fact that there has not been any separation of witnesses in drawing my factual findings in this case. As I do if there is a separation of witnesses also." (R. 31-32) "Mr. Robinson: May it please the Court, we would like for the Court to consider further that the Charging Party in this instance is not several named individuals

but it's a pretended or represented labor organization. And the labor organization is represented. The primary purpose and reason for these people being here is to appear as witnesses. If you fail to invoke the rule it greatly prejudices my client's case even though Your Honor would properly weigh the evidence according to the presentation thereof and in the similarities thereof. We are confident that the most learned of Solomons would have great difficulty in making such a determination. And we move that the real significance of these people's presence is to appear as witnesses. They are represented adequately by Public Employees Organizing Committee, Mr. Alex Hurder, whom we consider as the present person representing these parties although his organization is defunct. We see that Mr. Hurder still exists. We feel the parties representing the Government are relatively unbiased and we are confident your Honor can protect all witnesses that appear in your chambers. So, we again ask to exclude all those witnesses until they have testified and modify your order to allow those to remain after they have testified and instruct them not to discuss the case during the period before your final decision." (R. 33) The Motion was denied and the Employer's Counsel excepted to the ruling.

7. Was the Board in error as to the Administrative Trial Judge's finding that the Respondent is engaged in Commerce within the Meaning of Section 2 (6) and (7) of the Act. (Page 15 of the Finding)? Clearly the Administrative Law Judges and Regional Director premise "that the Respondent's purchase of $360. a month worth of supplies from a supplier within the State of Alabama, who had previously purchased said supplies from a source outside the state engages the Respondent in Interstate Commerce" by reason of said indirect inflow is repugnant to the fundamental laws governing property rights of the separate parties, as legal title to the goods in question passes first to the supplier within the State of Alabama, who at a later date for

a different price sells a different quantity of said goods to the Respondent in a different transaction; legal title, then and only then, passes to the Respondent in a separate transaction completely within the State of Alabama. Any other conclusion is pure fiction, and a violation of Respondent's right of doing business within the state, without the unlawful conclusion "that the business of the supplier is the business of the Respondent". Such a grotesque theory places every individual in interstate commerce, and would result in an unlawful extension of the National Labor Relations Act, which is limited by the Commerce clause of the United States Constitution, and serve to deny the Respondent of her Constitutional Right of Equal Protection under the Law.

(Question was timely raised by Para. 4, of Answers of Respondent to Complaints App. 19, 47 and by Exception to Administrative Trial Judge's Findings and by Petition and Brief to U. S. Ct. of Appeals)

8. Was the Board in error in its Administrative Trial Judge's finding that Respondent has engaged in unfair Labor Practices and unlawfully discharged listed employees. (Page 16 of Findings) as said findings are contrary to the preponderance of the credible evidence of the Record, relying completely on Hearsay and a theory of Constructive Discharges "by word of mouth of employees" telling other employees they were fired.

(Question was timely raised by Exception To Administrative Trial Judge's Findings and by Petition and Brief to U. S. Ct. of Appeals)

9. Was the Board in error in the Administrative Trial Judge's finding that the Administrator, Robinson "told the employees to go to work" did not constitute a valid offer of reinstatement? If the Respondent had discharged her employees for signing union cards (which she had not) the Administrator's clear order to the assembled group of

forty or more employees "to go on to work" was the most valid offer of reinstatement possible, for it was proven by cross-examination of hostile witnesses including the co-chairman of the Petitioner organization. To invalidate clear and firm offers of restatement, repeatedly established on cross-examination by four witnesses, by the testimony of rebuttal witnesses called by the Board to impeach their own witnesses, after a nineteen (19) hour recess and re-hearsal period demonstrates the obvious bias of the Board's Administrative Trial Judge and is erroneous in truth and in fact.

(Question was timely raised by Exception to Administrative Trial Judge's Findings and by Petition and Brief of U. S. Ct. of Appeals)

10. Was the Board in error in that its Administrative Law Judge did not credit the testimony of the Respondent because "Her resentment and indignation at her employees' signing union cards were apparent in her demeanor." (R. 6 of Findings). Yet without crediting the testimony of the Respondent, Esther Johnston, upon being called by the General Counsel even the pretense of a Prima Facie case of constructive discharges collapses completely. Apparently, any testimony of any kind in support of the Union's is credited, while any and all testimony in support of the Employer's position is automatically discredited. Systematically, the Administrative Trial Judge disregards testimony of witnesses for the Employer and admissions against interest on cross-examination by Union's witnesses "that they were told to go on to work" by the Administrator on the occasion of their pay day on March 11, 1972. Clearly the entire proceeding is based on the philosophy of the "Oath-Helpers," and as there were many former employees and only one employer, that one employer is discredited, for she is outnumbered by her former employees, and in the event the Administrative Law Judge should recite that

he has detected "resentment" in her expression, as she listens to a Parade of Perjury by former employees, this seventy year old lady, who has devoted her life to the care of the sick and aged, is ungraciously "called a Liar" by being discredited as a witness in her own defense by showing resentment, in the opinion of an Administrative Trial Judge, who accepts as a joke the kidnapping and beating of Zollie Colverson and credits the testimony of the wrong doers in that crime! (App. 592-623). Finds that the young son of the Respondent is "spying upon Union activity" if he drives his car on a public street in his home town." (App. 847). And has never learned the lesson of Lincoln, that "you do not benefit the wage-earner by pulling down the wage-payer."

(Question was timely raised by Exception to Administrative Trial Judge's Findings and by Petition and Brief to U. S. Ct. of Appeals)

11. Was the Board in error in its Decision requiring backpay, including the backpay which may accrue after September 22, 1972 until such time as alleged discriminatees are gainfully employed? Clearly, the decision on this point requiring the seventy year old Respondent to continue paying her former employees, after she no longer is an employer, would deprive Respondent of her property without due process of Law in violation of the 14th Amendment of the Constitution. The National Labor Relations Board alleges and finds that "the Petitioner is engaged in business within this Judicial Circuit" whereas, in truth and in fact the Petitioner at the age of 70 retired and went out of business on September 20, 1972, turned in her license, and leased out her property to a New York Company, as shown by Respondent's Exhibit #6 and #7 of the Record. (R. 500-503).

(Question was timely raised by Employer's Petition and Brief to U. S. Ct. of Appeals) (App. 772-776)

That on to-wit: January 26, 1972 two employees, Minnye Crenshaw and Margaret West, were terminated for neglecting a patient.

That on to-wit: January 28, 1972 an employee, Hazel Porter, was terminated for admittedly "sleeping on the job".

That on to-wit: February 25, 1972 an employee, Robert Edwards, was terminated for admittedly "carrying a gun on the job."

That on to-wit: February 26, 1972 an employee, Ola Veneziano, was terminated for "insubordination and using disrespectful language to a Supervisor."

All of these named employees (Crenshaw, West, Porter, Edwards and Veneziano,) were among those on the list attached to the Charges of Unfair Labor Practices filed by the Public Employees Organizing Committee against the Employer, however, all but Ola Veneziano's name were omitted in the Complaint subsequently issued against the Employer by the Regional Director. (App. 742-761) That during the first week, of March, 1972, several telephone calls were received by the employer "demanding that the terminated former employees were to be re-hired" all of which callers were advised that said former employees were terminated for good and valid reasons and were not eligible for re-hire. A picket line was established on March 6, 1972 in front of Fairview Nursing Home.

A week before the strike (R. General Counsel's Exhibit #9) (App. 73) the spokesman for the Southern Christian Leadership Conference declared that, "the Public Employees Organizing Committee, (P.E.O.C.) is prepared to attempt the shut-down of a local nursing home unless the Management reinstates six employees "fired for union activity" and the article identifies the nursing home as Fairview.

That on to-wit: March 11, 1972, a group of employees, that were scheduled to work on the 7:a.m. to 3:p.m. shift, failed to report to work and left one hundred and fifteen sick and aged patients unattended. Discovering this condition at approximately 8:a.m. on March 11, 1972, Esther J. Johnston, proceeded to call in relief employees only to have a large group of the people, who had failed to report to work push into her office, in a loud and unruly manner, demanding their pay "right then and now" when the scheduled pay day was 3:p.m. that afternoon, rather than 8:a.m. in the morning. Whereupon, your respondent advised the group, "that pay-checks were unsigned and could not be ready before 2:30 or 3:p.m." At which time said group walked down to the entrance driveway and joined the protestors there, returning at 3:p.m. demanding and receiving their pay in full. (App. 742 thru 761)

General Counsel's Exhibit No. 9 (App. 73) demonstrates that the Southern Christian Leadership Conference or the Public Employees Organizing Committee intended to "walkout" or to "strike" Fairview Nursing Home on or about March 2nd or 4th 1972 (App. 211-212)

The Public Employees Organizing Committee had a Committee Meeting on March 8, 1972 and "discussed the possibility of a Strike (App. 209-210) and further took other "affirmative action" that resulted in the walkout on the morning of March 11, 1972. (App. 212-213)

*On March 13, 1972,* the Public Employees Organizing Committee filed charges of Unfair Labor Practices against Fairview Nursing Home together with a list of fifty (50) employees. (Ref. General Counsel's Exhibit la) (App. 2) Signed by Ola Veneziano.

*On or about April 25 or 26, 1972,* at a meeting of the membership of the Public Employees Organizing Committee the individuals present voted to join the Laborer's International Union of North America, and the Public Em-

ployees Organizing Committee became defunct. (Ref. P. 2 of General Counsel's Exhibit #3 (App. 61) P. 1 thru 3 of Respondent's Exhibit #2) (App. 98)

*On May 18, 1972,* approximately three weeks after the Public Employees Organizing Committee became defunct, and ceased to exist the Regional Director of the National Labor Relations Board issued a Complaint and Notice of Hearing to Fairview Nursing Home, Case No. 10-CA-9482 (Ref. General Counsel's Exhibit 1 (c) (App. 10)

And said Complaint named Public Employee's Organizing Committee as the Labor Organization, and Charging Party.

The record does not support the findings that the employees were discharged for signing union cards, however, the record does establish that the employees engaged in a called strike or walkout and to affirm the Decision of the Board would be to rubberstamp a fraud, encourage arbitrary decisions of the National Labor Relations Board, and abandon the remaining Judicial Power of the Court that is being absorbed by that Agency.

Whereas, the Petitioner has established that there is prejudicial error in the Record, Justice requires that the Supreme Court issue it's Writ of Certiorari to the U. S. Circuit Court of Appeals for the Fifth Circuit, and Review the Record of the case at Bar.

S. Patrick Robinson

S. PATRICK ROBINSON
*Attorney for Petitioner*

## CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Petition for Writ of Certiorari in the above captioned case has been served by first class mail upon the following counsel at the address listed below this 19th day of April, 1974.

Hon. Elliott Moore
National Labor Relations Board
Washington, D. C. 20570

S. Patrick Robinson

S. PATRICK ROBINSON
*Attorney for Petitioner*

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK

...0 CAMP STREET
NEW ORLEANS, LA. 70130

March 22, 1974

Mr. S. Patrick Robinson
Attorney at Law
1213 S. 33rd Street
Birmingham, Alabama 35205

No. 73-1919 - Fairview Nursing Homes vs. National Labor Relations Board

MANDATE STAYED TO: April 21, 1974

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21(1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and our letter advising that rehearing was denied, which are still required by the Supreme Court to be incorporated as an appendix to your opinion.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By Carol L. Sage
Deputy Clerk

enc.
cc Mr. Elliott Moore
Mr. Walter C. Phillips
Messrs. Leonard N. Cohen
Fred M. Richardson

IN THE

# United States Court of Appeals

FOR THE FIFTH CIRCUIT

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No. 73-1919

Summary Calendar*

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FAIRVIEW NURSING HOME,

Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross Petitioner.

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*Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board (Georgia Case)*

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(December 12, 1973)

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Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

PER CURIAM: ENFORCED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N. O., La.

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
JAN 11 1974
EDWARD W. WADSWORTH
CLERK

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|---|---|---|
| FAIRVIEW NURSING HOME, Petitioner, | ) | |
| v. | ) | No. 73-1919 |
| NATIONAL LABOR RELATIONS BOARD, Respondent. | ) | |

JUDGMENT

Before Thornberry, Goldberg and Roney, Circuit Judges.

THIS CAUSE was submitted upon the petition of Fairview Nursing Home, to review a certain order of the National Labor Relations Board issued against Petitioner, its officers, agents, successors and assigns, on March 9, 1973, and upon the cross-application of the National Labor Relations Board to enforce said order. This Court having carefully considered the briefs and transcript of record filed in this cause, and being fully advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on December 12, 1973 handed down its opinion granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the above named Petitioner, and its officers, agents, successors and assigns shall by and perform the directions of the Board in said order contained.

ENTERED: JAN 11 1974

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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| FAIRVIEW [illegible], | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | No. 73-1919 |
| | ) | |
| NATIONAL LABOR RELATIONS BOARD, | ) | |
| | ) | |
| Respondent. | ) | |

CERTIFICATE OF SERVICE

The undersigned certifies that one copy of the Board's proposed judgment in the above-captioned case has this day been served by first class mail upon the following party at the address listed below:

S. Parrick Robinson, Esquire
1213 S. 33rd Street
Birmingham, Alabama 35205

/s/ Elliott Moore
Elliott Moore
Deputy Associate General Counsel
NATIONAL LABOR RELATIONS BOARD

Dated at Washington, D. C.
this 20th day of December, 1973.

United States Court of Appeals

FIFTH CIRCUIT

EDWARD W. WADSWORTH
CLERK

OFFICE OF THE CLERK
600 CAMP STREET
NEW ORLEANS, LA. 70130

March 11, 1974

TO ALL COUNSEL OF RECORD

Re: No. 73-1919 - Fairview Nursing Home v. NLRB

Gentlemen:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Alison LeBrun
Deputy Clerk

cc: Mr. S. Patrick Robinson
Mr. Elliott Moore
Mr. Walter C. Phillips
Messrs. Leonard N. Cohen
Fred M. Richardson

U.S. COURT OF APPEALS
FILED
FEB 25 '74
EDWARD W. WADSWORTH
CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 73-1919

U.S. COURT OF ..
RECEIVED
FEB 25 1974
NEW ORLEANS, LA.

FAIRVIEW NURSING HOME,

Petitioner-Cross Respondent,

versus

NATIONAL LABOR RELATIONS BOARD,

Respondent-Cross Petitioner.

- - - - -

On Application for Review of an Order of the National Labor Relations Board (GEORGIA CASE)

- - - - -

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion to supplement the record en banc, filed in the above styled and numbered cause, is hereby Granted

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

| | | |
|---|---|---|
| FAIRVIEW NURSING HOME, PETITIONER, | | |
| VS: | | NO. 73-1919 |
| NATIONAL LABOR RELATIONS BOARD, RESPONDENT | | |

MOTION TO SUPPLEMENT RECORD EN BANC

Comes the Petitioner and moves this Honorable Court pursuant to Rule 10 (e) to direct the National Labor Relations Board to Supplement the Record with the Truth Revealing Evidence in the Board's possession that subject employees engaged in a called Strike and were not discharged by the employer, as follows:

1. Two (2) sworn Affidavits by the President, Alex Hurder, and Chairlady, Ola Veneziano containing Judicial Admisions "that the Fairview Employees were on strike", attached to and made a part of the Pleadings in said Representation Case, and unlawfully removed from the Brief of the Employer to the Administrative Trial Judge. (Ref. attachments 1 & 2).

2. The sworn Affidavits of the employees taken by the Board in the Investigation of the charges, requested by Employer's Attorney during the Hearing, refused by the Board, and admitting that these several employees who were discharged were discharged for good and valid reasons. (Ref. attachment 3. and R. 477-479).

3. The Handbill Strike Notice dated March 11, 1972 circulated by the Strikers on the morning of the walkout, and showing the employees reporting to work were informed by their own leaders "that they were fired", and not by the employer, and said Strike Notice further declares, "The Fairview employees are ready and willing to go back to work when they are All called back. (Ref. Attachment 4.)

4. The union cards signed by the charging parties with the Hospital Local 1318 A. F. L. - C. I. O. on to wit: April 26, 1972 (Ref. Res. exibit 4 of the Record) and providing documentary proof that the P. E. O. C. did not represent the said charging parties at the point in time when subject Complaints were issued on May 18, 1972 and August 4, 1972, clearly establishing that the Board was in total error by denying the employer's Motion to Dismiss the entire proceeding. (Ref. attachment 5 & 6 hereto).

5. A week before the strike (Ref. General Counsel's Exibit #9) the spokesman for the Southern Christian Leadership Conference declared that, "the Public Employees Organizing Committee. (P.E.O.C.) is prepared to attempt the shut-down of a local nursing home unless the Management re-instates six employees "fired for union activity" and the article identifies the nursing home as Fairview.

Two weeks after the walkout actually occured, "a news release issued Wednesday by the Southern Christian Leadership Conference said workers at the home had been on strike for almost two weeks and information picket lines had been formed. (Ref. Petitioner's Attachment 7).

In its Shifting Role as Investigator, Prosecutor, and Judge of the alleged Unfair Labor Practices, the N. L. R. B. has in the Case at Bar abused its discretion and arbitrarily assumed a new role of "Protector of the Perjurers" by withholding and suppressing all evidence from the Record of the fundamental truth "that the employees of Fairview engaged in a voluntary strike against their employer.

As authority for this Motion, kindly consider that the previous action of the Board and separate Judges in denying the Employer's Request for Review, Motion to Adduce Additional Evidence and Motion to Remand are all subject to Review of this Court en banc.

Decisions of the National Labor Relations Board and the United States Circuit Courts of Appeal have authorized the reopening of a new record in an N.L.R.B. proceeding where new and previously unavailable evidence was found. An early expression of this principle is noted in Poinsett Lumber and Manufacturing Company, 116 N.L.R.B. 1732 (1956).

S. Patrick Robinson
Attorney for Employer

ATTACHMENT 1

STATE OF ALABAMA )

JEFFERSON COUNTY )

My name is Ola Veneziano. I reside at 1502 Cullman Avenue, Birmingham, Alabama 35208.

I have been active in the P.E.O.C. from its beginning. I was the Chairlady and Representative for the Fairview employees on the Steering Committee of P.E.O.C.

Before the meeting at which the vote for affiliation was taken leaflets were passed out. We were on strike at the time and in addition to the leaflets we learned of the vote by word of mouth. Since it was a regular meeting probably everyone, or nearly everyone planned to attend anyhow.

At the meeting where we voted to affiliate approximately 35 out of a total of 45 employees were present. Everyone voted to affiliate. We all recognized the need for a national union. No one, from Fairview or any other institution voted against affiliation. The vote was free and voluntary.

Ola Veneziano

Sworn to and
subscribed before me
this 11 day of May, 1972.

Notary Public

STATE OF ALABAMA )

JEFFERSON COUNTY )

ATTACHMENT 2

My name is Alex Hurder. I am the President of Hospital Employees Local Union 13~~7~~18 Laborer's International Union of North America, AFL-CIO, the sucessor union to the Public Employees Organizing Committee.

When P.E.O.C. was formed it was our intentions to seek affiliation with a national labor organization and if possible to negotiate contracts but we always recognized the need for the backing of a larger union. Our P.E.O.C. cards stated "I request to be represented at my place of employment and to be assisted in choosing a union by the Public Employees Organiz~~a~~ing Committee."

The meeting at which the vote for affiliation was taken was a regular meeting which took place at our headquarters. We did announce that an affiliation vote would be taken in the form of a leaflet which was passed out the preceding week.

I knew all or most of the striking employees at Fairview and a vast majority were present at the meeting. The vote was unanimous to affiliate with L.I.U. there were no dissenting votes. I would say that everyone was eager to affiliate with L.I.U.

Alex J. Hurder

Sworn to and
subscribed before me this
18 day of May, 1972.

Notary Public

ATTACHMENT 3

# NATIONAL LABOR RELATIONS BOARD

**OFFICE OF THE GENERAL COUNSEL**

Washington, D.C. 20570

July 28, 1972

Re: Fairview Nursing Home
Case No. 10-CA-9482

George C. Longshore, Esq.
Cooper, Mitch & Crawford
Suite 201 - 409 North 21st Street
Birmingham, Alabama 35203

Dear Mr. Longshore:

Your appeal in the above matter has been duly considered.

The appeal is sustained as to the discharge of Henderson and Grammer and denied as to the remainder. The employment status of the licensed practical nurses (LPNs) raised issues warranting Board determination on the basis of record testimony.

Therefore, inasmuch as two LPNs, Henderson and Grammer, were among those discharged for having signed Union cards, and inasmuch as that mass discharge of employees has been made the subject of an outstanding 8(a)(1) and (3) complaint, it was concluded that the discharges of Henderson and Grammer, as employees, should also be alleged as violations of Section 8(a)(1) and (3). Moreover, it was concluded that under the unique circumstances of this case, the discharge of Henderson and Grammer would violate Section 8(a)(1) even if the LPNs were supervisors.

However, under all the circumstances, it was concluded that the burden could not be met of establishing that three other LPNs, West, Crenshaw, and Porter, were discharged for reasons other than the Employer's dissatisfaction with their job performance. Thus, the evidence indicated that the owner discharged West and Crenshaw after concluding that they had been negligent in providing care for her husband, who had been admitted as a patient. The evidence also indicated that Porter was discharged by the administrator after he discovered here asleep on duty. Moreover, the evidence failed to establish that the Employer had any knowledge of Union membership or activity on the part of West, Crenshaw, and Porter at the time of their discharges.

Re: Case No. 10-CA-9482

Finally, the evidence was insufficient to warrant a finding that the discharge of Edwards, an orderly, was unlawfully motivated in the absence of evidence of Employer knowledge of his Union membership and in view of the fact that his Union activity was insubstantial.

Accordingly, the case is remanded to the Regional Director for addition to the outstanding complaint of appropriate 8(a)(1) and (3) allegations as to Effie Henderson and Vicki Grammer, absent settlement. All further inquiries should be addressed to the Regional Director.

Very truly yours,

Peter G. Nash
General Counsel

By Robert E. Allen
Robert E. Allen
Director, Office of Appeals

cc: Director, Region 10

Sam P. Robinson, Esq., Fairview Nursing Home, 1028 Bessemer Road, Birmingham, Alabama 35228
Public Employees Organizing Committee, 505-1/2 No. 17th Street - Room 310, Birmingham, Alabama 35202

CERTIFIED MAIL

ATTACHMENT 4

FAIRVIEW IS UNFAIR

The Fairview Nursing Home has fired all of its personnel because of union activities at the nursing home. There will be a picket line at Fairview until all of the workers are hired back.

Fairview Nursing Home fired six workers in February who had expressed a desire for a union. On March 6th the Public Employees Organizing Committee placed an "information picket line" in front of Fairview and maintained it with volunteers from all of the other hospitals and nursing homes in the city.

Workers on the day shift at Fairview called in on March 11th to say that they would be an hour late. Mrs. J. A. Johnston, the owner, fired the entire day shift. She told them, "Everyone who has signed a union card is fired." The other two shifts had all signed with the union, too. In order to deprive the employees of the right to organize, Mrs. Johnston is depriving all of her patients of proper care. The Fairview employees are ready and willing to go back to work when they are ALL called back. Mrs. Johnston and her assistant, Mr. Pat Robinson, are prolonging this crisis by refusing to allow the long time employees to go to work.

WHAT CAN YOU DO?

If you have been asked to work at Fairview, DO NOT WORK THERE! The Fairview workers are willing to go back and work. The jobs are theirs.

If you have a parent or relative at Fairview, we are asking you to call the owner, Mrs. J. A. Johnston, at 786-9697, and tell her you will remove your relative from the home if she does not hire back her experienced and competent staff. Thank you.

PEOC
505½ 17th Street North
Birmingham, Alabama
Phone 324-1555

3-11-72

ATTACHMENT 5


S. Patrick Robinson

ATTORNEY-AT-LAW

1213 S. 33rd Street
Birmingham, Alabama 35205

Ph: 328-2822


Hon. Elliott Moore
National Labor Relations Board
Washington, D. C. 20570

Dear Mr. Moore,

Please find herewith the Petitioner's Answer to your Cross-Application for enforcement.

It is requested that you file the attached Stipulation together with the Record of Case No. 10-RC-9112 whose issues were unresolved and overlapped into and became an integral part of the Record of the Case at Bar, particularly as to Pleadings, Motions and Exibits duly filed by both parties before the Administrative Trial Judge.

S. Patrick Robinson
Attorney for Petitioner

ATTACHMENT 5

ATTACHMENT 5

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

| | |
|---|---|
| FAIRVIEW NURSING HOME, PETITIONER, | |
| VS: | NO. 73-1919 |
| NATIONAL LABOR RELATIONS BOARD, RESPONDENT | |

REQUEST OF APPELLANT THAT THE ENTIRE RECORD, AND ANY PART THEREOF RETAINED BY THE N. L. R. B. BE TRANSMITTED TO THE FIFTH FIRCUIT COURT OF APPEALS

Whereas, the Respondent has heretofore filed a Certified list of the transcript of the record of the case at bar, and the Appellant submits that such abbreviated listing is inadequate for the preparation of an Appendix by the Appellant or the lawful Review of the Record by the Court and pursuant to Rule 17 (b) of F.R.A.P., the Appellant respectfully requests that the entire Record and any and all parts thereof retained by the National Labor Relations Board be transmitted to the Fifth Circuit Court of Appeals.

S. Patrick Robinson
Attorney for Petitioner

CERTIFICATE OF SERVICE

THE undersigned certifies that one copy of the above styled Request in the above captioned Case has been served by first class mail upon the following counsel at the address listed below this 11th day of June, 1973.

Hon. Elliott Moore,
National Labor Relations Board,
Washington, D. C. 20570

Walter C. Phillips, Director
Region 10, N.L.R.B.
730 Peachtree Street N. E.
Atlanta, Georgia 30308

Mr. Quinten Oliver Varner
5421 Avenue "I"
Birmingham, Alabama

Cooper, Mitch and Crawford
Att: George C. Longshore, Esq.
409 North 21st Street
Birmingham, Alabama 35203

Public Employees Organizing
Committee, Att. Alex Harder
505 - 4 North 17th St. Room 310
Birmingham, Alabama 35203

Laborers International Union of
North America, AFL-CIO, Local 131
2129 - 7th Ave., South
Birmingham, Alabama

S. Patrick Robinson
Attorney for Petitioner

ATTACHMENT 6 ATTACHMENT 6

United States of America

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Region 10

| | | |
|---|---|---|
| FAIRVIEW NURSING HOME | | |
| Employer | | |
| and | | Case No. 10-CA-9482<br>10-CA-9663 |
| PUBLIC EMPLOYEES ORGANIZING COMMITTEE | | |
| Petitioner | | |

MOTION TO DISMISS

Comes the Employer in the above styled cause, by and through her Attorney, and Moves The Board to Dismiss the Petition heretofore filed therein and for grounds for said Motion assign the following:

The Petitioner as shown in the Primary Case is defunct, it no longer exists.

Whereas said Petitioner is defunct and no longer exists, and no separate Complaint duly investigated has been issued by the Board for any other lawful Petitioner, said case No. 10-CA-9482 should be lawfully dismissed immeadiately.

S. Patrick Robinson

S. Patrick Robinson
Attorney for Employer

ATTACHMENT 7

E.C. #9

Committee may act

# Try to shut nursing home is possible

BY MIKE HARRIS

Carl Farris national labor director of the Southern Christian Leadership Conference, said this week the Public Employes Organizing Committee (PEOC) of Birmingham is prepared to attempt the shutdown of a local nursing home unless the management reinstates six employes "fired for union activity."

Farris, who has been directing the organization of local hospital and nursing home workers for the past four months, said, "we're taking a restrained approach right now, but if a walk-out is needed, then we're prepared to take that action if necessary."

Farris said at a news conference that six persons have been fired from their jobs at Fairview Nursing Home and that others have been layed off because of their union organizing activities.

Pat Robinson, an administrator at Fairview, said two persons were dismissed in the past two weeks at the nursing home for failure to perform assigned duties and disrespectful language to a supervisor.

Robinson said he knew of no union activity at Fairview and that, "As far as I'm concerned there is no union organizing here."

Farris said, "we're not going to stand by and permit workers to be fired, harrassed or punished for union organizing activities. This type of situation is deplorable in 1972."

He said representatives of PEOC have attempted to meet with the Fairview management about the problem, but so far there has been only one meeting on Jan. 18.

"Even though this situation involves only one nursing home, there will be workers from all hospitals in the area taking part in whatever action we decide to take," he said.

He did not specify what type of action will be used, but said it will be designed "to educate and persuade the management to correct the firing of employes for union activities."

# Nursing home owner denies union charges

**The owner of Fairview Nursing Home has denied charges that six workers were fired because of union organizing activities.**

THE HOME is located at 1028 Bessmer Super Highway.

Mrs. J. A. Johnston said several employes quit. Others, she said, had been released for "neglect of duty."

The Public Employees Organizing Committee has filed unfair labor practice charges against the nursing home with the National LaborRelations Board and also has asked NLRB to require an election at the nursing home on the question of union representing the employes.

Mrs. Johnston said no employes at the nursing home had discussed union activities with her or asked for a raise.

A news release issued Wednesday by the Southern Christian Leadership Conference said workers at the home had been on strike for almost two weeks and information picket lines had been formed.

SCLC claimed Mrs. Johnston had fired the entire morning shift, leaving only five experienced workers to handle 116 patients on the weekend of March 11-12.

Mrs. Johnston said there was "no truth" to the statement. She said more than 20 employes had quit their jobs at the home — most of them unskilled workers — but additional employes had been hired. Other workers had stayed on the job around the clock, she said.

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
MAY 1 1974
MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

NO. 73-1559

FAIRVIEW NURSING HOME,

*Petitioner*

VS.

NATIONAL LABOR RELATIONS BOARD,

*Respondent*

**SUPPLEMENTAL APPENDIX**

**TO**

**PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES**

S. PATRICK ROBINSON
*Attorney for Petitioner*
1213 South 33rd Street
Birmingham, Alabama 35205

## INDEX TO SUPPLEMENTAL APPENDIX

1. Stay of Mandate to April 21, 1974 ..... 1-2
2. Decision and Opinion of Court of Appeals of December 12, 1973 ..... 3
3. Judgment of Court of Appeals entered on January 11, 1974 ..... 4-5
4. Order of Court of Appeals denying the Petition for Rehearing dated March 11, 1974 ..... 6
5. Order granting motion to Supplement Record En Banc dated February 15, 1974 ..... 7-10
6. Decision and Order of National Labor Relations Board dated March 9, 1973 ..... 23-55
7. Evidence concerning Vicki Grammer ..... 56-57
8. Evidence concerning Effie Henderson ..... 58-59
9. Opinion of Administrative Trial Judge in the Record (App. 743) ..... 60

Certificate of Service ..... 61

**UNITED STATES COURT OF APPEALS**

Mr. S. Patrick Robinson
Attorney at Law
1213 S. 33rd Street
Birmingham, Alabama 35205

---

**NO. 73-1919**

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FAIRVIEW NURSING HOME,

VS.

NATIONAL LABOR RELATIONS BOARD

Mandate Stayed To: April 21, 1974

Dear Sir:

The court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with the clerk of this court a notice from the clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 21 (1) of the Supreme Court effective July 1, 1970, a record is no longer required in connection with an application for writ of certiorari, and therefore will not be routinely prepared by this office (38LW 3502).

Enclosed is a copy of the opinion, judgment and our letter advising that rehearing was denied, which are still

required by the Supreme Court to be incorporated as an appendix to your opinion.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By /s/ Carol LeSage

Deputy Clerk

enc.

cc Mr. Elliott Moore
Mr. Walter C. Phillips
Messrs. Leonard N. Cohen
Fred M. Richardson

IN THE

**UNITED STATES COURT OF APPEALS**

FOR THE FIFTH CIRCUIT

---

**NO. 73-1919**
**Summary Calendar***

---

FAIRVIEW NURSING HOME,
*Petitioner-Cross Respondent,*

versus

NATIONAL LABOR RELATIONS BOARD,
*Respondent-Cross Petitioner.*

---

*Petition for Review and Cross Application for Enforcement of an Order of the National Labor Relations Board (Georgia Case)*

---

(December 12, 1973)

---

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

PER CURIAM: ENFORCED. See Local Rule 21.[1]

---

*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

Adm. Office, U.S. Courts—Scofields' Quality Printers, Inc., N.O., La.

**UNITED STATES COURT OF APPEALS**

FOR THE FIFTH CIRCUIT

---

**NO. 73-1919**

---

FAIRVIEW NURSING HOME,

*Petitioner,*

VS.

NATIONAL LABOR RELATIONS BOARD,

*Respondent*

**JUDGMENT**

Before Thornberry, Goldberg and Roney, Circuit Judges.

THIS CAUSE was submitted upon the petition of Fairview Nursing Home, to review a certain order of the National Labor Relations Board issued against Petitioner, its officers, agents, successors and assigns, on March 9, 1973, and upon the cross-application of the National Labor Relations Board to enforce said order. This Court having carefully considered the briefs and transcript of record filed in this cause, and being advised in the premises, and having determined the case appropriate for summary disposition without oral argument, on December 12, 1973 handed down its opinion granting enforcement of the Board's Order.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by the United State Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced, and that the above named Petitioner, its officers, agents, successors and assigns abide by and perform the directions of the Board in said order contained.

**UNITED STATES COURT OF APPEALS**

FOR THE FIFTH CIRCUIT

---

**NO. 73-1919**

---

FAIRVIEW NURSING HOME,
*Petitioner,*

VS.

NATIONAL LABOR RELATIONS BOARD,
*Respondent.*

**CERTIFICATE OF SERVICE**

The undersigned certifies that one copy of the Board's proposed judgment in the above-captioned case has this day been served by first class mail upon the following party at the address listed below:

S. Patrick Robinson, Esquire
1213 S. 33rd Street
Birmingham, Alabama 35205

/s/ Elliott Moore

Deputy Associate General Counsel
NATIONAL LABOR
RELATIONS BOARD

Dated at Washington, D. C.
this 20th day of December, 1973.

**UNITED STATES COURT OF APPEALS**

FOR THE FIFTH CIRCUIT

TO ALL COUNSEL OF RECORD

---

**Re: NO. 73-1919**

---

FAIRVIEW NURSING HOME,

VS.

NLRB

Gentlemen:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH
*Clerk*

By /s/ Susan LeBrun

Deputy Clerk

cc: Mr. S. Patrick Robinson
Mr. Elliott Moore
Mr. Walter C. Phillips
Messrs. Leonard N. Cohen
Fred M. Richardson

**UNITED STATES COURT OF APPEALS**

FOR THE FIFTH CIRCUIT

---

**NO. S73-1919**

---

FAIRVIEW NURSING HOME,
*Petitioner-Cross Respondent,*

versus

NATIONAL LABOR RELATIONS BOARD,
*Respondent-Cross Petitioner.*

On Application for Review of an Order of the National Labor Relations Board (Georgia Case)

Before Thornberry, Goldberg and Roney, Circuit Judges.

BY THE COURT:

IT IS ORDERED that appellant's motion to supplement the record en banc, filed in the above styled and numbered cause, is hereby granted.

**UNITED STATES COURT OF APPEALS**

FOR THE FIFTH CIRCUIT

---

**NO. 73-1919**

---

FAIRVIEW NURSING HOME,

*Petitioner,*

VS.

NATIONAL LABOR RELATIONS BOARD,

*Respondent*

**MOTION TO SUPPLEMENT RECORD EN BANC**

Comes the Petitioner and moves this Honorable Court pursuant to Rule 10 (c) to direct the National Labor Relations Board to Supplement the Record with the Truth Revealing Evidence in the Board's possession that subject employees engaged in a called Strike and were not discharged by the employer, as follows:

1. Two (2) sworn Affidavits by the President, Alex Hurder, and Chairlady, Ola Veneziano containing Judicial Admisions "that the Fairview Employees were on strike", attached to and made a part of the Pleadings in said Representation Case, and unlawfully removed from the Brief of the Employer to the Administrative Trial Judge. (Ref. attachments 1 & 2).

2. The sworn Affidavits of the employees taken by the Board in the Investigation of the charges, requested by Employer's Attorney during the Hearing, refused by the Board, and admitting that those several employees who were discharged were discharged for good and valid reasons. (Ref. attachment 3. and R. 477-479).

3. The Handbill Strike Notice dated March 11, 1972 circulated by the Strikers on the morning of the walkout, and showing the employees reporting to work informed by their own leaders "that they were fired", and not by the employer, and said Strike Notice further declares, "The Fairview employees are ready and willing to go back to work when they are *ALL* called back.
(Ref. Attachment 4.)

4. The union cards signed by the charging parties with the Hospital Local 1318 A. F. L. - C. I. O. on to wit: *April 26, 1972* (Ref. Res. exhibit 4 of the Record) and providing documentary proof that the P. E. O. C. did not represent the said charging parties at the point in time when subject Complaints were issued on *May 18, 1972* and *August 4, 1972,* clearly establishing that the Board was in total error by denying the employer's Motion to Dismiss the entire proceeding.
(Ref. attachment 5 & 6 hereto).

5. A week before the strike (Ref. General Counsel's exhibit #9) the spokesman for the Southern Christian Leadership Conference declared that, *"the Public Employees Organizing Committee, (P.E.O.C.) is prepared to attempt the shut-down of a local nursing home unless the Management re-instates six employees "fired for union activity"* and the article identifies the nursing home as Fairview.

Two weeks after the walkout actually occured, *"a news release issued Wednesday by the Southern Christian Leadership Conference said workers at the home had been on strike for almost two weeks and information picket lines had been formed.*
(Ref. Petitioner's Attachment 7).

In its Shifting Role as Investigator, Prosecutor, and Judge of the alleged Unfair Labor Practices, the N.L.R.B.

has in the Case at Bar abused its discretion and arbitrarily assumed a new role of "Protector of the Perjurers" by withholding and suppressing all evidence from the Record of the fundamental truth *"that the employees of Fairview engaged in a voluntary strike against their employer.*

As authority for this Motion, kindly consider that the previous action of the Board and separate Judges in denying the Employer's Request for Review, Motion to Adduce Additional Evidence and Motion to Remand are all subject to Review of this Court en banc.

Decisions of the National Labor Relations Board and the United States Circuit Courts of Appeal have authorized the reopening of a new record in an N.L.R.B. proceeding where new and previously unavailable evidence was found. An early expression of this principle is noted in *Poinsett Lumber and Manufacturing Company,* 116 N.L.R.B. 1732 (1956).

/s/ S. Patrick Robinson

Attorney for Employer

**ATTACHMENT 1**

STATE OF ALABAMA )
JEFFERSON COUNTY )

My name is Ola Veneziano. I reside at 1502 Cullman Avenue, Birmingham, Alabama 35208.

I have been active in the P.E.O.C. from its beginning. I was the Chairlady and Representative for the Fairview employees on the Steering Committee of P.E.O.C.

*Before the meeting at which the vote for affiliation was taken leaflets were passed out. We were on strike at the time and in addition to the leaflets we learned of the vote by word of mouth.* Since it was a regular meeting probably everyone, or nearly everyone planned to attend anyhow.

At the meeting where we voted to affiliate approximately 35 out of a total of 45 employees were present. Everyone voted to affiliate. We all recognized the need for a national union. No one, from Fairview or any other institution voted against affiliation. The vote was free and voluntary.

/s/ Ola Veneziano

Sworn to and
subscribed before me
this 18 day of May, 1972.

/s/ ???

Notary Public

**ATTACHMENT 2**

STATE OF ALABAMA )
JEFFERSON COUNTY )

My name is Alex Hurder. I am the President of Hospital Employees Local Union 1318. Laborer's International Union of North America, AFL-CIO, the sucessor union to the Public Employees Organizing Committee.

When P.E.O.C. was formed it was our intentions to seek affiliation with a national labor organization and if possible to negotiate contracts but we always recognized the need for the backing of a larger union. Our P.E.O.C. cards stated "I request to be represented at my place of employment *and to be assisted in choosing a union by the Public Employees Organizing Committee.*"

The meeting at which the vote for affiliation was taken was a regular meeting which took place at our headquarters. We did announce that an affiliation vote would be taken in the form of a leaflet which was passed out the preceding week.

*I knew all or most of the striking employees at Fairview and a vast majority were present at the meeting.* The vote was unanimous to affiliate with L.I.U. there were no dissenting votes. I would say that everyone was eager to affiliate with L.I.U.

/s/ Alex J. Hurder

Sworn to and
subscribed before me this
18 day of May, 1972.

/s/ Marie Grauer

**ATTACHMENT 3**

**NATIONAL LABOR RELATIONS BOARD**

Office of the General Counsel
Washington, D.C. 20570
July 28, 1972
Re: Fairview Nursing Home

**Case No. 10-CA-9482**

George C. Longshore, Esq.
Cooper, Mitch & Crawford
Suite 201 - 409 North 21st Street
Birmingham, Alabama 35203

Dear Mr. Longshore:

Your appeal in the above matter has been duly considered.

The appeal is sustained as to the discharge of Henderson and Grammer and denied as to the remainder. The employment status of the licensed practical nurses (LPNs) raised issues warranting Board determination on the basis of record testimony.

Therefore, inasmuch as two LPNs, Henderson and Grammer, were among those discharged for having signed Union cards, and inasmuch as that mass discharge of employees has been made the subject of an outstanding 8(a) (1) and (3) complaint, it was concluded that the discharges of Henderson and Grammer, as employees, should also be alleged as violations of Section 8(a) (1) and (3). Moreover, it was concluded that under the unique circumstances of this case, the discharge of Henderson and Grammer would violate Section 8(a) (1) even if the LPNs were supervisors.

However, under all the circumstances, it was concluded that the burden could not be met of establishing that three other LPNs, West, Crenshaw, and Porter, were discharged

for reasons other than the Employer's dissatisfaction with their job performance. Thus, the evidence indicated that the owner discharged West and Crenshaw after concluding that they had been negligent in providing care for her husband, who had been admitted as a patient. The evidence also indicated that Porter was discharged by the administrator after he discovered her asleep on duty. Moreover, the evidence failed to establish that the Employer had any knowledge of Union membership or activity on the part of West, Crenshaw, and Porter at the time of their discharges.

Finally, the evidence was insufficient to warrant a finding that the discharge of Edwards, an orderly, was unlawfully motivated in the absence of evidence of Employer knowledge of his Union membership and in view of the fact that his Union activity was insubstantial.

Accordingly, the case is remanded to the Regional Director for addition to the outstanding complaint of appropriate 8(a) (1) and (3) allegations as to Effie Henderson and Vicki Grammer, absent settlement. All further inquiries should be addressed to the Regional Director.

Very truly yours,
Peter G. Nash
General Counsel

By /s/ Robert E. Allen

Robert E. Allen
Director, Office of Appeals

cc: Director, Region 10
Sam P. Robinson, Esq., Fairview Nursing Hame, 1028 Bessemer Road, Birmingham, Alabama 35228
Public Employees Organizing Committee, 505-1/2 No. 17th Street - Room 310, Birmingham, Alabama 35202

CERTIFIED MAIL

**ATTACHMENT 4**

## FAIRVIEW IS UNFAIR

The Fairview Nursing Home has fired all of its personnel because of union activities at the nursing home. There will be a picket line at Fairview until all of the workers are hired back.

Fairview Nursing Home fired six workers in February who had expressed a desire for a union. On March 6th the Public Employees Organizing Committee placed an "information picket line" in front of Fairview and maintained it with volunteers from all of the other hospitals and nursing homes in the city.

Workers on the day shift at Fairview called in on March 11th to say that they would be an hour late. Mrs. J. A. Johnston, the owner, fired the entire day shift. She told them, "Everyone who has signed a union card is fired." The other two shifts had all signed with the union, too. In order to deprive the employees of the right to organize, Mrs. Johnston is depriving all of her patients of proper care. *The Fairview employees are ready and willing to go back to work when they are ALL called back.* Mrs. Johnston and her assistant, Mr. Pat Robinson, are prolonging this crisis by refusing to allow the long time employees to go to work.

## WHAT CAN YOU DO?

If you have been asked to work at Fairview, DO NOT WORK THERE! The Fairview workers are willing to go back and work. The jobs are theirs.

If you have a parent or relative at Fairview, we are asking you to call the owner, Mrs. J. A. Johnston, at 786-9697, and tell her you will remove your relative from

the home if she does not hire back her experienced and competent staff. Thank you.

PEOC
505½ 17th Street North
Birmingham, Alabama
Phone 324-1555

3-11-72

**ATTACHMENT 5**

S. PATRICK ROBINSON
Attorney-At-Law

1213 S. 33rd Street
Birmingham, Alabama 35205
Ph. 328-2822

Hon. Elliott Moore
National Labor Relations Board
Washington, D. C. 20570

Dear Mr. Moore,

Please find herewith the Petitioner's Answer to your Cross-Application for enforcement.

It is requested that you file the attached Stipulation together with the Record of Case No. 10-RC-9112 whose issues were unresolved and overlapped into and became an integral part of the Record of the Case at Bar, particularly as to Pleadings, Motions and Exhibits duly filed by both parties before the Administrative Trial Judge.

/s/ S. Patrick Robinson

Attorney for Petitioner

**UNITED STATES COURT OF APPEALS**

FOR THE FIFTH CIRCUIT

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**NO. 73-1919**

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FAIRVIEW NURSING HOME,
*Petitioner,*

VS.

NATIONAL LABOR RELATIONS BOARD,
*Respondent*

**REQUEST OF APPELLANT THAT THE ENTIRE RECORD, AND ANY PART THEREOF RETAINED BY THE N. L. R. B. BE TRANSMITTED TO THE FIFTH CIRCUIT COURT OF APPEALS**

Whereas, the Respondent has heretofore filed a Certified list of the transcript of the record of the case at bar, and the Appellant submits that such abbreviated listing is inadequate for the preparation of an Appendix by the Appellant or the lawful Review of the Record by the Court and pursuant to Rule 17 (b) of F.R.A.P., the Appellant respectfully requests that the entire Record and any and all parts thereof retained by the National Labor Relations Board be transmitted to the Fifth Circuit Court of Appeals.

/s/ S. Patrick Robinson

S. Patrick Robinson
Attorney for Petitioner

## CERTIFICATE OF SERVICE

THE undersigned certifies that one copy of the above styled Request in the above captioned Case has been served by first class mail upon the following counsel at the address listed below this 11th day of June, 1973.

Hon. Elliott Moore,
National Labor Relations Board,
Washington, D.C. 20570

Walter C. Phillips, Director
Region 10, N.L.R.B.
730 Peachtree Street N.E.
Atlanta, Georgia 30308

Mr. Quinten Oliver Varner
5421 Avenue "I"
Birmingham, Alabama

Cooper, Mitch and Crawford
Att: George C. Longshore, Esq.
409 North 21st Street
Birmingham, Alabama 35203

Public Employees Organizing Committee,
Att.Alex Hurder
505-½ North 17th St.
Room 310
Birmingham, Alabama 35203

Laborers International Union of North America, AFL-CIO, Local 131
2129 - 7th Ave., South
Birmingham, Alabama

/s/ S. Patrick Robinson

S. Patrick Robinson
Attorney for Petitioner

**ATTACHMENT 6**

**UNITED STATES OF AMERICA**

BEFORE THE NATIONAL LABOR
RELATIONS BOARD
REGION 10

FAIRVIEW NURSING HOME
*Employer*

and

PUBLIC EMPLOYEES ORGANIZING COMMITTEE
*Petitioner*

Case No. 10-CA-9482
10-CA-9663

**MOTION TO DISMISS**

Comes the Employer in the above styled cause, by and through her Attorney, and Moves The Board to Dismiss the Petition heretofore filed therein and for grounds for said Motion assign the following:

The Petitioner as shown in the Primary Case is defunct, it no longer exists.

Whereas said Petitioner is defunct and no longer exists, and no separate Complaint duly investigated has been issued by the Board for any other lawful Petitioner, said case No. 10-CA-9482 should be lawfully dismissed immediately.

/s/ S. Patrick Robinson
S. Patrick Robinson
Attorney for Employer

**ATTACHMENT 7**

Committee may act

## TRY TO SHUT NURSING HOME IS POSSIBLE

By Mike Harris

Carl Farris national labor director of the Southern Christian Leadership Conference, said this week the Public Employees Organizing Committee (PEOC) of Birmingham is prepared to attempt the shut-down of a local nursing home unless the management reinstates six employees "fired for union activities."

Farris, who has been directing the organization of local hospital and nursing home workers for the past four months, said, "we're taking a restrained approach right now, but if a walk-out is needed, then we're prepared to take that action if necessary."

Farris said at a news conference that six persons have been fired from their jobs at Fairview Nursing Home and that others have been layed off because of their union organizing activities.

Pat Robinson, an administrator at Fairview, said two persons were dismissed in the past two weeks at the nursing home for failure to perform assigned duties and disrespectful language to a supervisor.

Robinson said he knew of no union activity at Fairview and that, "As far as I'm concerned there is no union organizing here."

Farris said, "we're not going to stand by and permit workers to be fired, harrassed or punished for union organizing activities. This type of situation is deplorable in 1972."

He said representatives of PEOC have attempted to meet with the Fairview management about the problem, but so far there has been only one meeting on Jan. 18.

"Even though this situation involves only one nursing home, there will be workers from all hospitals in the area taking part in whatever action we decide to take," he said.

He did not specify what type of action will be used, but said it will be designed "to educate and persuade the management to correct the firing of employes for union activities."

## NURSING HOME OWNER DENIES UNION CHARGES

The owner of Fairview Nursing Home has denied charges that six workers were fired because of union organizing activities.

THE HOME is located at 1028 Bessmer Super Highway.

Mrs. J. A. Johnston said several employees quit. Others, she said, had been released for "neglect of duty."

The Public Employees Organizing Committee has filed unfair labor practice charges against the nursing home with the National Labor Relations Board and also has asked NLRB to require an election at the nursing home on the question of union representing the employees.

Mrs. Johnston said no employees at the nursing home had discussed union activities with her or asked for a raise.

A news release issued Wednesday by the Southern Christian Leadership Conference said workers at the home had been on strike for almost two weeks and information picket lines had been formed.

SCLC claimed Mrs. Johnston had fired the entire morning shift, leaving only five experienced workers to handle 116 patients on the weekend of March 11-12.

Mrs. Johnston said there was "no truth" to the statement. She said more than 20 employees had quit their jobs at the home — most of them unskilled workers — but additional employees had been hired. Other workers had stayed on the job around the clock, she said.

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

FAIRVIEW NURSING HOME

and Case 10–CA–9482

PUBLIC EMPLOYEES ORGANIZING COMMITTEE

and Case 10–CA–9663

QUENTEN OLIVER VARNER, an Individual

## DECISION AND ORDER

On December 7, 1972, Administrative Law Judge Lowell Goerlich issued the attached Decision in this consolidated proceeding. Thereafter, the Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings,[1] findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

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[1]Respondent also has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an Administrative Law Judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions were incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544, enfd. 188 F.2d 362 (C.A. 3). We have carefully examined the record and find no basis for reversing his findings.

Respondent also contends that the Administrative Law Judge prejudiced its case by failing to find that the alleged discriminatees were told by Respondent's counsel, Robinson, who was also Respondent's administrator, to go to work after they were fired. Con-

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that Respondent, Fairview Nursing Home, Birmingham, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Administrative Law Judge's recommended Order.

Dated, *Washington, D.C.*

*Howard Jenkins, Jr., Member*

*Ralph E. Kennedy, Member*

*John A. Penello, Member*

NATIONAL LABOR RELATIONS BOARD

(SEAL)

trary to Respondent, the Administrative Law Judge did find that the employees were initially told by Robinson to go to work but found that when they told him they were fired by Mrs. Johnston, Respondent's owner, for signing union cards, Robinson then told them "[W]ait for your second check. I'll make out your other checks," and never informed the employees that they were not discharged for signing union cards. We agree with the Administrative Law Judge that the aforesaid conduct did not constitute a valid offer of reinstatment.

We have reviewed the Administrative Law Judge's rulings made at the hearing and find that they are free from prejudicial error.

[2]The Administrative Law Judge inadvertently found that the discharges of Supervisors Effie Henderson and Vicki Grammer were violative of Sec. 8(a)(3) and (1) of the Act when it is clear that these discharges are only violative of Sec. 8(a)(1). Member Penello concurs in these findings as he is of the view that these discharges, which were made in the context of pervasive unfair labor practices, were part and parcel of these other violations, and were not motivated by the prounion activity of the *supervisors* as at the time Respondent fired all union card signers it was not aware that they had signed cards, but rather were part of a *pattern* of conduct aimed at penalizing *employees* for their union activities.

## DECISION

### Statement of the Case

LOWELL GOERLICH, Administrative Law Judge: The charge in Case 10–CA–9482, filed by Public Employees Organizing Committee, on March 13, 1972,[1] was served on the Respondent, Fairview Nursing Home, by registered mail on March 15. A complaint and notice of hearing was issued May 18, 1972. The complaint charged that on February 27 the Respondent discharged its employee, Ola Veneziano, and on March 11 discharged its employees, Edna Avery, Clara Barnett, Margaret Edna Barnett, Maxine Bell, Mabel Black, Bernice Bowden, Emma Bryant, Willen Dean Cary, Zollie Culverson, Ruby Carpenter, Nannie Mae Collins, Lucile Cummins, Kathleen Gillian, Willie B. Hall, Dorothy Hartefield, Mamie L. Henderson, Dorothy Hicks, Mattie Hill, Winifred Hudson, Richard Jones, Odesa Carlton, Luvenia Kenerly, Mattie Kennedy, Mary Kate Lanier, Dovie Lee, Imogene Maharrey, Etha L. Martin, Elvira Mason, Dorothy McDaniel, Magnolia Mitchell, Missa Norris, Nettie Peak, Helen Peeler, Willie Posey, Eleanor Reese,[2] Mary Elizabeth Richey, Lutitia Swanson, Andrew Tabb, Addie L. Ward, and Etta Lee Wright, in violation of Section 8(a)(3) of the National Labor Relations Act, Series 8, as amended, herein referred to as the Act. It was further charged in the complaint that the Respondent engaged in surveillance of a union meeting of its employees. On August 4, an amendment to the complaint was filed in which the names of Effie

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For the reasons set forth in his dissenting opinion in *Krebs and King Toyota, Inc.*, 197 NLRB No. 74, Member Kennedy would not find these discharges to be violative of the Act and would accordingly dismiss these allegations in their entirety.

[1]All dates herein refer to 1972 unless otherwise noted.

[2]Eleanor Reese testified as Eleanor Reese Mills.

Henderson and Vicki Grammer were added to the complaint.

The charge, in Case 10—CA—9663 filed by Quenten Oliver Varner, an individual, on June 30, was served on the Respondent by registered mail on July 3. The complaint and notice of hearing was issued on August 4. The complaint charged that the Respondent had discharged its employee, Quenten Oliver Varner, on March 11, in violation of Section 8(a)(3) of the Act. In addition, it was charged that the Respondent informed its employees that it would be futile to select the Union as their bargaining representative because the Respondent would not have a union to represent its employees; that it had coercively interrogated employees about their union membership, activities, and desires; that it had created an impression of surveillance of its employees' union activities; and that it had promulgated, maintained, and enforced a rule prohibiting its employees from engaging in any activities on behalf of a union at any time in the nursing home.

On August 4, an order was entered consolidating Cases 10—CA—9482 and 10—CA—9663.[3]

[3]Hospital Employees Local 1318, Laborer's International Union of North America, AFL-CIO, the Petitioner in Case 10—RC—9112, was allowed to intervene in this proceeding in that a finding in the instant case as to whether or not the Respondent wrongly discharged certain employees would affect the eligibility of those employees whose ballots were challenged in the representation election.

**UNITED STATES OF AMERICA**

BEFORE THE NATIONAL LABOR
RELATIONS BOARD
DIVISION OF JUDGES
WASHINGTON, D.C.

FAIRVIEW NURSING HOME
and Case 10–CA–9482
PUBLIC EMPLOYEES ORGANIZING COMMITTEE
FAIRVIEW NURSING HOME
and Case 10–CA–9663
QUENTEN OLIVER VARNER, an Individual

*Leonard N. Cohen, Esq.*, and *Fred M. Richardson, Esq.*, of Atlanta, Ga., for the General Counsel

*S. Patrick Robinson, Esq.*, of Birmingham, Ala., for the Respondent.

*Alex Hurder*, of Birmingham, Ala., for Charging Parties and the alleged discriminatees.

*Wendell Edwards*, of Birmingham, Ala., for the Hospital Employees Local 1318, Laborer's International Union of North America, AFL-CIO.

*George C. Longshore, Esq.*, of Birmingham, Ala., for the Public Employees Organizing Committee and Hospital Employees Local 1318, Laborer's International Union of North America, AFL-CIO and the alleged discriminatees.

The Respondent filed timely answers denying that it had engaged or was engaging in any of the unfair labor practices alleged. *Inter alia,* in its answer in Case 10-CA-9482, Respondent admitted that Ola Veneziano was discharged, but alleged that the discharge was "for cause in that said former employee created a disturbance on the job, and used disrespectful language and profanity to a supervisor, constituting insurbordination and misconduct, and therefore was not eligible for reinstatement." The Respondent further denied that it had discharged the other employees listed in the complaint and answered that "said former employees quit without notice and thereby abandoned all lawful interest in said employment."

The consolidated cases came on for trial on September 26, 27, 28, and 29, 1972, at Birmingham, Alabama. Each party was afforded a full opportunity to be heard, to call, examine, and cross-examine witnesses, to argue orally on the record, to submit proposed findings of fact and conclusions, and to file briefs. All briefs have been carefully considered.

## Findings of Fact[4]

### *I. The Business of the Respondent*

The Respondent is, and has been at all times material herein, a sole proprietorship with its principal office and place of business located at Birmingham, Alabama, where it is engaged in the operation of a nursing home.

The Respondent during the past calendar year, which period is representative of all times material herein, received gross revenues in excess of $400,000, $86,000 of which were derived from Medicaid payments by the Federal Government. During the first 3 months of 1972, a representative period, the Respondent purchased goods

[4]The facts found herein are based on the record as a whole and the observations of the witnesses.

valued at $360, from a supplier within the State of Alabama, who received such goods directly from outside the State of Alabama. Projected to a yearly expenditure, such purchases would total $1,440. Respondent is, and has been at all times material herein, engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.[5] (See Decision of Election in Case 10-RC-9112.)

On the first day of August 1972, the Respondent entered into a lease and option agreement with Vari-Care, Inc., a Delaware corporation. The lease and option agreement provided for a term of 5 years commencing on the first day of September 1972 and ending on the last day of August 1977, with a monthly rental of $65, "for each bed which tenant is permitted to use by virtue of its license to operate the facility under the laws of the State of Alabama as of the commencement of each monthly period, for which the rent is charged, which in no event shall be less than a 165 beds." The lease was subject to an option to purchase the premises at any time during the term of the lease or at any renewal thereof at a price of "$10,000 for each bed which the tenant is permitted to use by virtue of its license to operate the facility by the State of Alabama at the time of the exercise of the option, which in no event shall be less than one hundred and sixty-five (165) beds," a total consideration of $1,650,000. A license effective September 20, 1972, was issued by the Alabama State Board of Health to Vari-Care, Inc., to operate Fairview Nursing and Convalescent Home, "under their operational ownership." On September 22, the Respondent terminated all of its employees and turned the keys and the operation of its nursing home business over to Vari-Care, Inc. Vari-Care, Inc., hired new employees and some of those who had been employed by the Respondent.

[5]The Respondent admitted the facts above-stated, however, denied that it was engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

## *II. The Labor Organization Involved*

Public Employees Organizing Committee, herein referred to as the Union, is, and has been at all times material herein, a labor organization within the meaning of Section 2 (5) of the Act.[6]

## *III. The Unfair Labor Practices*[7]

### A. Pertinent Facts

At all times material herein Esther J. Johnston, sometimes referred to herein as Mrs. Johnston, was the owner of the Respondent, S. Patrick Robinson was the adminis-

[6]In Case 10–RC–9112, the Regional Director for Region 10 issued a Supplemental Decision and Order Amending Decision and Direction of Election, in which the Regional Director found that, "Laborer's International Union of North America, AFL–CIO, Hospital Employees Local 1318 has replaced PEOC [Public Employees Organizing Committee] as Petitioner herein." The Regional Director further found that Local 1318 was an organization in which employees participated and which existed for the purpose of representing employees with regard to working conditions, hours, and employee grievances and was a labor organization seeking to represent certain of the employer's employees. The Regional Director ordered an election with Local 1318 on the ballot. A request for review of the Regional Director's decision was denied by the Board. In the earlier Decision and Direction of Election, dated May 3, 1972, the Acting Regional Director for Region 10 had found that Public Employees Organizing Committee was an organization in which employees participated and that it existed for the purpose of dealing with employers concerning wages, hours of employment, and conditions of work and that it was a labor organization within the meaning of the Act.

[7]The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits with due regard for the natural logic of probability, the demeanor of the witnesses, and the teaching of *N.L.R.B. v. Walton Manufacturing Company & Loganville Pants Co.*, 369 U.S. 404, 408. As to those witnesses testifying in contradiction to the findings herein, their testimony has been discredited, either as having been in conflict with the testimony of credible witnesses or because it is in and of itself incredulous and unworthy of belief. In addition, consideration has been given to the fact that many of the General Counsel's witnesses were cross-examined as to incidents in which the Respondent's cross-examiner was personally involved and did, notwithstanding, testify adversely to the Respondent.

trator (Robinson also appeared as attorney for the Respondent in this proceeding), and Ronnie Johnston was the assistant administrator.

Alex J. Hurder was the chairman of the Public Employees Organizing Committee and is presently the president of Local 1318 of the Laborer's International Union, which position he assumed in the first week of May 1972. Public Employees Organizing Committee was formed in November 1971 for the purpose of representing employees of the University of Alabama in matters concerning wages, hours, and working conditions. Thereafter, its objectives were broadened to include the representation of employees of nursing homes in the Birmingham area.

On January 20, 1972, a rally was held by the Public Employees Organizing Committee at which Ralph Abernathy, president of the Southern Christian Leadership Conference, was the principal speaker. Pamphlets were distributed announcing the rally. Four or five employees of the Respondent attended. Several of these employees signed authorization cards for the Union. On January 27, an organizational meeting was held for those who had signed cards. Some of the employees of Respondent attended this meeting. During the first week in February, at a meeting of the Respondent's employees, employees Ola Veneziano and Mattie Kennedy were elected cochairwomen.

About the midle of February some of the Respondent's employees met at the Steelworkers hall in Fairfield. On that occasion, employee Luvenia Kenerly arrived early and waited in front of the Steelworkers hall. With her were employees Dorothy Hicks, Lucile Cummins, Ola Veneziano, and others. Ronnie Johnston, in an automobile parked directly across the street, was observing the employees. About 2 weeks later, Ronnie Johnston again observed the employees while in a parked car across the street from the

Center Street Baptist Church where the Respondent's employees were holding a union meeting.

Another union meeting was held on February 26 at Lucile Cummins' home. About 10 or 12 of the Respondent's employees were present. In that several employees of the Respondent had been recently discharged the possibility of a strike was discussed. It was decided, however, to encourage the employees to find some other means of protesting. A P.E.O.C. newsletter was distributed. On February 27, employee Kenerly placed a copy of the Newsletter under Mrs. Johnston's door between 6:30 and 7 a.m. Shortly thereafter, Robinson came in, picked up the newsletter, read it, and then left the area. The newsletter contained a letter from a dissatisfied, unidentified "LPN from Fairview." The abbreviation, LPN, indicates a Licensed Practical Nurse.

About 10 minutes after the newsletter had been slipped under Mrs. Johnston's door Ola Veneziano was discharged. About a week later, employee Kenerly heard Robinson say to the head housekeeper, Lena Nichols, that "[H]e didn't think that he had anything to worry about. That he thought they got the head of the Union when they fired Ola."

According to a report which Mrs. Johnston[8] claimed she had received from Mr. Robinson, Veneziano had been "fussing" all night with another employee, Beulah Smith. Robinson asked both of the employees what the trouble was. Veneziano, "started talking loud talk to him . . . . She asked him to go to hell and he asked her to leave. Check out and leave."[9] Veneziano was discharged, between 6 and 7 o'clock.

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[8]Mrs. Johnston's credibility has been given serious consideration. Her resentment and indignation at her employees' signing union cards were apparent in her demeanor as she testified. She gave the strong impression that her account of the March 11 events was not strictly in accord with what actually happened. As to the discharge of Veneziano, the reason given by Mrs. Johnston for her discharge is not accepted as the true reason.

[9]Testimony of Mrs. Johnston.

On February 27, 1972, Hurder phoned Mrs. Johnston and informed her that he was chairman of the Public Employees Organizing Committee and that he wanted to talk to her about the discharges and the situation at the nursing home. She agreed to meet with him around 3 o'clock at which time he appeared at the nursing home in the company of Virgil Pierson, a representative from the Steelworkers. When they arrived, Mrs. Johnston had left. They waited about 20 minutes, but she did not return.

On March 6, an informal picket line was placed at the foot of the hill on which the nursing home was located. The pickets carried signs explaining that employees had been discharged for organizing. This picket line, which continued through March 11, was manned by the six employees who had been fired by the Respondent and other members of the Union from hospitals in Birmingham. None of the employees of the nursing home joined or observed the picket line.

When it became apparent that the Respondent did not intend to recall the employees whom it had fired, there was general sentiment among the employees in favor of striking. Rather than to engage in the strike it was determined that the morning shift should call in late on March 11, and report to work an hour late. This course of action was followed.

Prior to March 11, the Respondent had held several biweekly staff meetings. At one of these meetings, Mrs. Johnston said, "You can't have a union come in here. I'm private owned and no one will come in and tell me how to run my business." Both Mrs. Johnston and Robinson were quoted as saying at a staff meeting that they "weren't going to have no union up there;" that the first one whom they "caught trying to form a union they were automatically fired;" and "if they were thinking that now [they] could resign." Mrs. Johnston was also quoted as saying at staff meetings that "anybody that tries to bring a union to my

building I will fire every last one of them," and that "anybody who tried to form a union and signed cards [I will] fire every last one of them."[10]

About 3 weeks before March 11, LPN Bradford upon instruction from Mrs. Johnston called several employees over a loudspeaker to appear at the second floor nurses' station. These employees included employees Lanier, Avery, Lee, Mitchell, and Peeler. Mrs. Johnston indicated that someone had informed her that the employees were trying to start a union. She said, "y'all can't do that because I am self-owned, I'm self-operated and I won't have a union in my place." At this point the telephone rang and Mrs. Johnston, in answering it, said, "I do need nurse's aides and it won't be long until I'll need a lot more." Mrs. Johnston told the employees to return to work and that she "didn't want to hear anymore of this about a union."

In about the middle of February, Mrs. Johnston phoned employee Helen Elizabeth Peeler to report for work. During the conversation, Mrs. Johnston asked her whether she knew "anything about the union." Peeler lied to her in response. About 3 weeks before March 11, employees Edna Avery called Mrs. Johnston in respect to her schedule. During the conversation, Mrs. Johnston asked employee Avery whether she knew "anything about this union business." She also asked whether she had attended "any of them ol' meetings." Although Avery had signed a union card, she denied knowledge of the Union and that she had attended one meeting.

About 2 weeks before March 11, Mrs. Johnston asked employee Emma Bryant in the presence of Willie Posey, "Have you been attending any of these meetings?" Bryant answered in the negative. Whereupon Johnston insisted, "You have." Bryant answered, "No, ma'm, I attended a rally." Mrs. Johnston then said that she had heard some-

[10]Although Mrs. Johnston testified, the foregoing testimony was not denied.

thing about a union and asked Bryant whether she knew anything about it. Bryant answered in the negative. Johnston responded, "If I ever hear talk that you all tried to bring a union in here I'm going to fire every last one of you."[11]

Sometime during the first week of March, Mrs. Johnston phoned Eleanor Reese Mills in order to ascertain when she would be able to return to work. During the conversation, Mrs. Johnston asked Mills whether she had signed a union card.

About 2 weeks before March 11, Head Housekeeper Nichols and employee Mamie Henderson were in the linen room. Nichols said to Henderson, "You was at the meeting last night." Henderson answered in the negative. After repeating herself several times and again receiving negative answers, Nichols said, "Some respectable person saw you there." Henderson again denied the fact. Nichols added, "Mrs. Johnston is going to fire all of them that signed union cards."

On or about the first of March, Nichols escorted employee Clara Barnett to Mrs. Johnston's office, where Mr. Robinson, Mrs. Johnston, and Mrs. Robinson were waiting. Mr. Robinson asked her whether she knew anything about the Union; she answered, "Yes, sir." Whereupon Robinson said, "Didn't you know this nursing home belonged to Mrs. Johnston . . . . Didn't Mrs. Johnston sign your checks?" He then asked her whether she had signed a union card.

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[11]Employee Posey testified credibly that he was asked to join the group by Mrs. Johnston and that she also interrogated him as to whether he knew anything about the "union business." He quoted her saying, "if they are trying to sneak a union in here, she was not going to have it. Every one would be fired at the time she found out about it." During the period prior to March 11, Posey said that he had several phone conversations with Mrs. Johnston in which the Union was mentioned. During these conversations, Mrs. Johnston asked him whether he had signed a union card and also told him "not to sign one."

She answered, "Yes, sir," and asked if she was fired. Johnston responded, "No, go back to work."

On the morning of March 11, LPN's Effie Henderson and Virginia Diliberto reported for work at 7 o'clock.[12] Employees on the first shift did not appear but Henderson received phone messages from some employees such as, "The car broke down. Some of them had to change tires. Some had to catch the bus." Diliberto informed Mrs. Johnston of the situation whereupon Mrs. Johnston came to the nursing home. In the meantime, the employees arrived for work and were instructed by Nichols to proceed to the lobby. Among the first of these employees was Mary Kate Lanier to whom Mrs. Johnston said, "What are you doing coming in this time of morning?" She answered, "We were told to be an hour late." Addressing employee Helen Peeler, Mrs. Johnston asked whether she was "with that trash." Peeler answered, "Yes, ma'm, I am." Mrs. Johnston responded, "Well, get down to the foot of the hill with them, you sorry looking thing." To employee Willie Posey, who, according to Mrs. Johnston, depended on her and called her "Mamma Johnston," Mrs. Johnston said, "Willie, you been knowing about this thing all the while and you've been lying to me all the time. As far as I'm concerned with your little black self you can get down the hill with the rest of them." Angrily Mrs. Johnston declared that any employee who "signed a union card was fired." She told the assembled employees, to get down to the foot of the hill with the rest of the "idiots" and off her property. She informed the employees that she had called the police who soon arrived and told the employees it was "best" for them to go to the bottom of the hill. At that time, arrangements were made for the police to escort the employees back to the nursing home to receive their paychecks which were due at 3 o'clock that afternoon. The

[12]For the purposes of this decision the General Counsel concedes that the LPN's are supervisors within the meaning of the Act.

employees proceeded to the bottom of the hill. Henderson, who was watching from a window, upon seeing the employees leave, "threw the medicine keys down" and addressing Diliberto said "Here, it's yours. I'm gone with them." Employees in this group who were ordered off the premises and discharged were Luvenia Kenerly, Dorothy Hicks, Helen Peeler, Mary Kate Lanier, Quenten Varner, Margaret Barnett, Willie Posey, Zollie Culverson, Etta Wright, Dovie Lee, Mattie Hill, Nannie Mae Collins, Willen Dean Cary, Dorothy McDaniel, Mamie Henderson, Eleanor Reese Mills, and Missa Norris, all of whom had signed union cards. These employees were joined by other employees at the bottom of the hill who learned from them that if they had signed a union card they were discharged. These additional employees were Mattie Kennedy, Magnolia Mitchell, Emma Bryant, Winifred Hudson, Andrew Tabb, Mary Elizabeth Richey, Mabel Black, Clara Barnett, Maxine Bell, Lucile Cummins, Kathleen Gillian, Richard Jones, Odesa Jelks Carlton, Addie Ward, Ruby Carpenter, Nettie Mae Peak, Elvira Mason, and Effie Henderson, all of whom had signed union cards.

On two occasions, between 10:30 and 11 a.m. and approximately at 2:30 p.m., Administrator Robinson appeared at the foot of the hill and offered the employees their paychecks. On each occasion, when the employees refused the checks, Robinson made the statement that the employees might as well take their checks because they were fired anyway. On the latter occasion, employee Emma Bryant remarked to Robinson that "we are fired two times in one day."

At 3 p.m., the employees appeared at the nursing home to receive their checks, as previously appointed. Among these employees were third-shift employees who were dressed for work. Robinson told these employees to go to work. The employees responded that they were fired and that Mrs. Johnston said "it went for everybody who had

signed union cards." Robinson then told them, "[W]ait for your second check."[13] "I'll make out your other checks." These employees as well as others were given two checks.[14] When employee Magnolia Mitchell appeared she was given one check. She brought this matter to Robinson's attention and said, "If we are fired for signing cards I want my other four days." Robinson answered, "If you will wait I will make it." Employee Andrew Tabb, a card signer, who was not scheduled to work on March 11, also appeared for his check. He was given two paychecks, "a check that [he] was supposed to pick up and the days [he] had remaining that [he] had worked over because the pay period had closed." Tabb was not scheduled to work until the following Monday.

Employee Edna Avery, a card signer, last worked on March 10 and was not scheduled to work again until Wednesday, March 15; however, she had made arrangements with Robinson that he would call her on Sunday if her days could be increased from 3 to 5 days a week. When he had not called as of Wednesday, she called Mrs. Johnston. She said to Mrs. Johnston, "[i]f I'm fired would you mail me my check, my last check." Mrs. Johnston answered, "Yes, ma'm, I will." When Avery asked when she would mail it, Mrs. Johnston replied, "When I get good and ready."

Some time in late August, employee Posey called Mrs. Johnston and asked to return to work. She said that she would give him some work at her home, but she wanted to talk to Robinson first. She asked Posey to call back the

[13]One paycheck covered wages earned during the pay period for which payment was to have been made on Saturday, March 11. The second check referred to wages which had been earned after such pay period ended. Normally, payment for this period would not have occurred until the following Saturday.

[14]Significantly at no time, although the opportunity presented itself, did Robinson inform the employees that they were not discharged for signing union cards or invite any of the card signers to return to work.

next day. When Posey called again Mrs. Johnston told him that Robinson "thought that it was best for [Posey] not to return to work because [he] was in this mess, too, and to wait until all of it was over."

The Respondent offered evidence indicating that certain employees ought not to be reinstated because of their misconduct.

Janis Chaffin, a receptionist and secretary, said that on one occasion she answered the phone and a man said, "Tell Mr. Robinson if he wants to keep on living him and his wife will stay at home." The person was not identified. Chaffin also said that she received a telephone call from Elizabeth Richey. Richey said, "They are going to bomb your house tonight." Chaffin also testified that roofing nails on one occasion had been scattered at the bottom of the driveway near the side of the highway.

Employee Addie Cogburn claimed that employee Elizabeth Richey said to her, "If we catch you going in that nursing home again we will kill you."[15] Hilda Lee Cogburn, a sister-in-law of Addie Cogburn, said that while she went through the picket line Richey "screamed out if we didn't stop going to the ursing home she would be waiting on us at night and kill us and we wouldn't go back. She called us tramps and said we took their jobs . . . . She called us slums, bastards, and everything else."

Loma Robinson described an incident involving Quenten Varner which took place around the first part of May or the latter part of April at Miller's parking lot. Loma Robinson was sitting in her automobile when her sister approached, indicating that employee Varner was following her. After her sister entered the automobile and as the automobile commenced to move, Varner rammed a shopping cart into the right side of the car. Both ladies, who are in their early 60's, were greatly agitated by the incident

[15]Most of the employees who were working on March 11 were new employees.

and according to Loma Robinson her sister became ill and a short time thereafter was placed in intensive care. Early in June she died. Cause of death was listed as heart failure.[16]

Employee Zollie Culverson went with the employees to the bottom of the hill on March 11. When Robinson offered the checks to the employees at the bottom of the hill on March 11, Culverson took his check which was payment in full for the time he had worked. About a month later, Culverson went back to work for 1 day. Mrs. Johnston had offered him a raise from a $1.68 an hour to $2.25 an hour.

After he had returned to work for the 1 day, Dorothy McDaniel, Emma Bryant, and Magnolia Mitchell, who usually transported him to the picket line, arrived at his home in an automobile. McDaniel was informed that Culverson was going to work. The employees left. Shortly thereafter, the three employees saw Culverson near a ball park and stopped the automobile. They asked Culverson where he was going. He replied that he was going to work. They asked him why he was not going to the picket line. A brief discussion followed after which he entered the automobile with the three women. They proceeded to Eleanor Reese's house. Kenerly and Hicks also went to Reese's house. The women and Culverson remained there for about a half hour, during which time Culverson asked for and received some whiskey. Among other things Culverson said, "Y'all I know I did wrong. I shouldn't have gone back up there because Mrs. Johnston has been so dirty to me." McDaniel jocularly said, "Come on Zollie. We are going to teach you a little lesson." From a "little hedge bush" in Reese's frontyard McDaniel seized a small switch

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[16]Mattie Mae Smiley accused Mattie Hill of a telephone threat. Hill denied the threat. In view of Hill's denial and the vagueness of the identification, a finding that Hill made the telephone threat is not supported and none can be made.

and, while Culverson was laughing, she struck him "one or two licks." All of the employees were laughing.

After the incident, the employees including Culverson went together to the picket line. At the picket line Culverson asked some of the women to wrap his head with white gauze so that he could fool Mrs. Johnston. This was done.[17]

**A. The Alleged Violations of Section 8(a)(1) of the Act**

As noted above, Mrs. Johnston interrogated employees with respect to their union activities. These interrogations occurred within the context of other unfair labor practices. Their purpose was not communicated to the employees nor were any assurances against reprisals given to them.[18] Indeed, while interrogating one employee, Mrs. Johnston threatened that if employees tried to bring in a union "every last one" would be fired. Moreover, the Respondent did not prove that such questioning was pursuant to the Employer's legitimate business interests. The effect of the questioning was to inhibit union activity[19] and instill in the minds of employees fear of discrimination on the basis of the information sought.[20] Accordingly, it is found that by the following interrogations the Respondent violated Section 8(a)(1) of the Act:[21]

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[17]In respect to this incident, where Culverson's testimony conflicts with that of Mitchell it is discredited.

[18]The Board has said, "Questioning selected employees about their union sympathies . . . without any assurance against reprisal, by its very nature tends to inhibit employees in the exercise of their right to organize." *Engineered Steel Products, Inc.*, 188 NLRB No. 52.

[19]"It is well settled that such interrogation violates Section 8(a)(1) when its probable effect is to inhibit union activity." *N.L.R.B. v. Southern Electronics Co.*, 430 F.2d 1391 (C.A. 6).

[20]"Such interrogation as to union sympathy and affiliation has been held to violate the Act because of its natural tendency to instill in the minds of employees fear of discrimination on the basis of the information the employer has obtained." *N.L.R.B. v. West Coast Casket Company, Inc.*, 205 F.2d 902, 904 (C.A. 9).

[21]See *N.L.R.B. v. Super Toys, Inc.*, 458 F.2d 180 (C.A. 9); *Hendel Manufacturing Company, Incorporated*, 197 NLRB No. 179.

(a) Mrs. Johnston's interrogation of employee Peeler about the middle of February as to whether she knew "anything about the union."

(b) Mrs. Johnston's interrogations of employee Avery about 3 weeks before March 11 as to whether she knew "anything about this union business" and whether she had attended a union meeting.

(c) Mrs. Johnston's interrogations of employee Bryant in the presence of employee Posey about 2 weeks before March 11 as to whether she had been attending union meetings and whether she knew anything about the Union.

(d) Mrs. Johnson's interrogation of employee Posey about 2 weeks before March 11, as to whether he knew anything about the Union and her interrogations of him as to whether he had signed a union card.

(e) Mrs. Johnston's interrogation of employee Elearnor Reese Mills during the first week of March as to whether she had signed a union card.

(f) Administrator Robinson's interrogations of employee Barnett about the first of March as to whether she knew anything about the Union and whether she had signed a union card.[22]

The Respondent also violated Section 8 (a) (1) by threats of reprisal uttered at employee staff meetings, to wit: "You can't have a union come in here"; the first one "caught trying to form a union" would be "automatically fired";[23] and "anybody who tried to form a union and signed cards she [Mrs. Johnston] would fire every last one of them." Likewise the Respondent violated Section 8 (a) (1) by Mrs. Johnson's threat to employee Bryant about 2 weeks before March 11 when she said, "If I ever hear

[22]Although Mrs. Johnston testified, none of these coercive interrogations was denied.

[23]The Board has said, "We regard a threat of job loss to be a serious deterrent to organizational activity." *Comet Rice Mills Division, Early California Industries, Inc.*, 195 NLRB No. 117.

talk that you all tried to bring a union in here I am going to fire every last one of you." The Respondent further violated Section 8 (a) (1) by the head housekeeper's threat to employee Henderson about 2 weeks before March 11, to wit: "Mrs. Johnston is going to fire all of them that sign cards."[24]

When Assistant Administrator Ronnie Johnston observed the employees' meeting places from a car parked across from the Steelworkers hall and later at the Center Street Baptist Church, the Respondent violated Section 8 (a) (1) of the Act. When Mrs. Johnston told employees that someone had told her that the employees were trying to start a union and when Head Housekeeper Nichols informed employee Henderson that "some respectable person" had seen her at a union meeting, the Respondent created the impression that its employees' union activities were under surveillance and thereby violated Section 8 (a) (1) of the Act.[25]

### B. The Discharge of Ola Veneziano

Not only does the uncontroverted and credited testimony of employee Kenerly (Kenerly testified that she overheard Administrator Robinson say that "he didn't think that he had anything to worry about. That he thought they got the head of the Union when they fired Ola") support a finding that Veneziano was discharged in violation of Section 8 (a) (3) of the Act, but other factors support the same conclusion. Veneziano had been seen by Assistant Administrator Ronnie Johnston at a union meeting place; she was

[24]Although Mrs. Johnston and Mrs. Nichols testified, they did not deny the foregoing threats.

[25]"[T]he law reasons that when the employer either engages in surveillance or takes steps leading his employees to think it is going on, they are under threat of economic coercion, retaliation, etc." *Hendrix Manufacturing Company, Inc.*, 321 F.2d 100, 104, fn. 7 (C.A. 5). See also *N.L.R.B. v. Ralph Printing and Lithographing Company*, 371 F.2d 687, 691 (C.A. 8).

the cochairwoman of the union;[26] she was discharged shortly after a union newsletter had been observed by Administrator Robinson and during the Union's initial organizational attempt;[27] and there is no credible evidence that she had not been a satisfactory employee.[28] Moreover, Veneziano was discharged during a period in which the Employer was exposing its union animus by coercive interrogations and threats of discharge to employees who signed union cards.[29] Additionally, to rebut the General Counsel's *prima facie* case the Respondent produced vague and illusory evidence. The Respondent relied solely upon the hearsay testimony of Mrs. Johnson, who is a discredited witness. The Respondent did not offer the testimony of the employee with whom Veneziano is alleged to have "fussed" the night of February 26. The record is barren of any explanation for the absence of this witness.[30] Obviously, the Respondent has not met the General Counsel's *prima facie* case. Accordingly, it is clear that the Respondent's defense savors of pretext and that the "real

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[26]"Obviously the discharge of a leading union advocate is a most effective method of undermining a union organizational effort." *N.L.R.B. v. Longhorn Transfer Service*, 346 F.2d 1003, 1006 (C.A. 5).

[27]As stated in *N.L.R.B. v. Jamestown Sterling Corp.*, 211 F.2d 725, 726 (C.A. 2): "[T]he unexplained coincidence of time with respect to the principal events was really no coincidence at all, but rather part of a deliberate effort by the management to scotch the lawful measures of the employees before they had progressed too far toward fruition."

[28]"The discharge of qualified workers who are also active unionists '. . . is a circumstance of suspicion which may give rise to a justified inference of violative discrimination.'" *Betts Baking Co. v. N.L.R.B.*, 380 F.2d 199, 204 (C.A. 10).

[29]". . . every equivocal act that was done may be properly viewed in the light of respondent's animus toward the effort to organize its men." *N.L.R.B. v. Houston and North Texas Motor Freight Lines, Inc.*, 193 F.2d 394, 398 (C.A. 5), cert. denied 343 U.S. 934.

[30]"The production of weak evidence when strong is available can lead only to the conclusion that the strong would have been adverse. Silence then becomes evidence of the most convincing character." *Interstate Circuit, Incorporated v. U.S.* 306 U.S. 208, 226. See also *Threads-Incorporated*, 124 NLRB 968, 971.

motive"[31] of the Respondent was to discourage membership in a labor organization.[32] By the discharge of Ola Veneziano on February 27, 1972, the Respondent violated Section 8 (a) (3) of the Act.

### C. The Discharges of the Remaining Alleged Discriminatees

The credible evidence establishes without doubt that the Respondent intended to and did discharge employees because they signed union cards. This message was given by Mrs. Johnston to those employees who were in the lobby on March 11 and it was reiterated by Administrator Robinson to those employees who were at the foot of the hill on March 11 when Robinson said that the employees might as well take their checks because they were all fired. Thus, except for card signers Bernice Bowden, Willie B. Hall, Dorothy Hartefield, Imogene Maharrey, Etha L. Martin, Lutitia Swanson, and Vicki Grammer who were neither in the lobby nor at the bottom of the hill, all of the discriminatees had been notified by word of mouth that they were discharged. That the Respondent intended to discharge all card signers is evident from the fact that when the second-shift employees revealed to Robinson that they were also card signers, he asked them to wait for their second checks and did not disavow Mrs. Johnston's remark that all card signers were fired. Moreover, card signer Tabb who was not scheduled to work until Monday received two checks, his pay in full, on March 11. Indeed, on the follow-

[31]". . . the 'real motive' of the employer in an alleged 8(a)(3) violation is decisive." *N.L.R.B. v. Brown d/b/a Brown Food Store*, 380 U.S. 278, 287. "It is the 'true purpose' or 'real motive' in hiring or firing that constitutes the test." *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America [Los Angeles-Seattle Motor Express] v. N.L.R.B.*, 365 U.S. 667, 675.

[32]In reaching this conclusion the adverse inference which may be drawn from the failure of the General Counsel to call Veneziano as a witness has been considered and weighed.

ing Wednesday when employee Avery was scheduled to work, Mrs. Johnston did not dispel the belief that she was fired but said she would mail her last check to her. That the Respondent did not intend to offer any of the card signers reemployment is further buttressed by the fact that when Posey sought reemployment, Mrs. Johnston told him that he could not return to work until "this mess" was over. It is clear from the record as a whole that the Respondent did not want a single card signer in its employ, but wished them all at the bottom of the hill with the rest of the "idiots." Mrs. Johnston's threat to fire any employee who signed a union card was not an idle threat, but was executed with vigor and dispatch when all card signers were given their final checks. Under these circumstances, it is trenchant that the Respondent intended to and did discharge all card signers,[33] the true purpose of which was to discourage membership in a labor organization. Its claim that these employees "abandoned their employment and 'quit without notice' and engaged in a 'called strike' or 'walk out' against the Respondent," or as stated in its answer, "said employees quit without notice and thereby abandoned all lawful interest in the said employment" is wholly without merit. Accordingly, by the discharges of the discriminatees listed in the complaints and the amendment to the complaint,[34] the Respondent violated Section 8 (a) (3) of the Act.

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[33]See *Casino Operations, Inc.*, 169 NLRB 328, 329.

[34]The General Counsel concedes that Effie Henderson and Vicki Grammer, listed in the amendment to the complaint in Case 10–CA–9482, are supervisors within the meaning of the Act for the purposes of this decision. Nevertheless, the General Counsel asserts that the Respondent violated Sec. 8(a)(3) of the Act by their discharges, citing *Krebs and King Toyota, Inc.*, 197 NLRB No. 74. There is no doubt that Mrs. Johnston intended to and did discharge employees because they signed union cards and that the true purpose of the Respondent was to discourage membership in a labor organization. The discharges of card signers Henderson and Grammer were in furtherance of the same purpose and a part of the Respondent's strategy to rid itself of the Union. Their discharges

**Conclusions of Law**

1. The Union is a labor organization within the meaning of the Act.

2. The Respondent is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act, and it will effectuate the purposes of the Act for jurisdiction to be exercised herein.

3. By interfering with, restraining, and coercing employees in the exercise of rights guaranteed them by Section 7 of the Act, the Respondent has engaged in unfair labor practices within the meaning of Section 8 (a) (1) of the Act.

4. By unlawfully discharging Ola Veneziano on February 27, 1972, and Edna Avery, Clara Barnett, Margaret Edna Barnett, Maxine Bell, Mabel Black, Bernice Bowden, Emma Bryant, Willen Dean Cary, Zollie Culverson, Ruby Carpenter, Nannie Mae Collins, Lucile Cummins, Kathleen Gillian, Willie B. Hall, Dorothy Hartefield, Mamie L. Henderson, Dorothy Hicks, Mattie Hill, Winifred Hudson, Richard Jones, Odesa Carlton, Luvenia Kenerly, Mattie Kennedy, Mary Kate Lanier, Dovie Lee, Imogene Maharrey, Etha L. Martin, Elvira Mason, Dorothy McDaniel, Magnolia Mitchell, Missa Norris, Nettie Peak, Helen Peeler, Willie Posey, Eleanor Reese Mills, Mary Elizabeth Richey, Lutitia Swanson, Andrew Tabb, Addie L. Ward, Etta Lee Wright, Quenten Oliver Varner, Vicki Grammer, and Effie Henderson on March 11, 1972, Respondent en-

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had a tendency to cause employees to forsake or avoid membership in a union for fear that they would be subjected to the same reprisal. As stated in *Miami Coca Cola Bottling Company d/b/a Key West Coca Cola Bottling Company* 140 NLRB 1359, 1361, discharges such as those of Henderson and Grammer are "an integral part of a pattern of conduct aimed at penalizing employees for their union activities." (Cited with approval in *Krebs and King Toyota, Inc., supra.*) Thus Henderson and Grammer were, as were the other employees, discriminated against in regard to "tenure of employment" to "discourage membership" in a labor organization and thereby the Respondent violated Sec. 8(a)(3) and (1) of the Act.

gaged in unfair labor practices within the meaning of Section 8 (a) (1), and (3) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

**Recommended Remedy**

It having been found that the Respondent has engaged in certain unfair labor practices, it is recommended that it cease and desist therefrom and take affirmative action designed to effectuate the policies of the Act.

It having been found that the Respondent unlawfully discharged Ola Veneziano, Edna Avery, Clara Barnett, Margaret Edna Barnett, Maxine Bell, Mabel Black, Bernice Bowden, Emma Bryant, Willen Dean Cary, Zollie Culverson, Ruby Carpenter, Nannie Mae Collins, Lucile Cummins, Kathleen Gillian, Willie B. Hall, Dorothy Hartefield, Mamie L. Henderson, Dorothy Hicks, Mattie Hill, Winifred Hudson, Richard Jones, Odesa Carlton, Luvenia Kenerly, Mattie Kennedy, Mary Kate Lanier, Dovie Lee, Imogene Maharrey, Etha L. Martin, Elvira Mason, Dorothy McDaniel, Magnolia Mitchell, Missa Norris, Nettie Peak, Helen Peeler, Willie Posey, Eleanor Reese Mills, Mary Elizabeth Richey, Lutitia Swanson, Andrew Tabb, Addie L. Ward, Etta Lee Wright, Quenten Oliver Varner, Vicki Grammer, and Effie Henderson it is recommended that Respondent remedy such unlawful conduct. It is recommended in accordance with Board policy[35] that the Respondent offer said employees[36] immediate and full re-

[35]See *The Rushton Company*, 158 NLRB 1730, 1740.

[36]In respect to Varner, in view of the serious nature of his misconduct the General Counsel does not contend that he is entitled to reinstatement and full backpay. ". . . a striking employee's misconduct may justify an employer's refusal to reinstate. 29 U.S.C. Sec. 160 (c). The question in each case is whether, under the circumstances, the alleged misconduct of the striker is sufficient to justify the refusal to reinstate." *W. J. Ruscoe Company v. N.L.R.B.*, 406 F.2d 725, 727 (C.A. 6). Varner's conduct plainly was of such a

instatement to their former positions or, if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges and make them whole for any loss of earnings that they may have suffered as a result of the discrimination against them by payment to them of a sum of money equal to the amount they would have earned from the date of their discriminatory discharges to the date of an offer of reinstatement, less net earnings during such period to

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character as to justify the Employer's refusal to reinstate him. However the General Counsel claims that under the circumstances Varner is, nevertheless, entitled to backpay from March 11, the date of his discharge, until the day of the Loma Robertson incident. In the case of a discriminatory discharge in violation of Sec. 8(a)(3) of the Act, the remedial purpose is both to restore the "situation, as nearly as possible, to that which would have obtained but for the illegal discrimination," (*Phelps Dodge Corporation v. N.L.R.B.*, 313 U.S. 177, 194) and to deter the employer from a repetition of like misconduct. Since the public interest is at stake, the employer ought not to be allowed, as a matter of course, to profit from his own wrongful misconduct and be wholly exonerated from the Act's sanctions because the employee likewise was at fault. Indeed, the Board "will balance the severity of the employer's unfair labor practice which provoked the industrial disturbance against whatever employee misconduct may have occurred in the course of the strike." *N.L.R.B. v. Thayer Company, and H. N. Thayer*, 213 F.2d 748, 755 (C.A. 1). Thus, where circumstances permit, the Act's sanctions ought to be accommodated. In this case some backpay accrued during a period prior to the time the employee's misconduct occurred and during a period in which the Employer normally would have been obligated for backpay which was required not only as a restoration of the *status quo ante* but also as a deterrent against the Employer's repetition of like misconduct. Thus under the circumstances of this case there seems to be no sound reason to wholly shut off the remedial demands of the Act and void its deterrent effect because of the subsequent misconduct of an employee which has no relevance to the Employer's misconduct unless one were to reason that the employee's misconduct would not have occurred had the Employer not unlawfully discharged him. Accordingly, as requested by the General Counsel, backpay for Varner is awarded from March 11 until the day of the Loma Robertson incident.

In respect to the conduct of the other discriminatees, it was not of such a serious or flagrant nature as to justify the withholding of the normal remedy of reinstatement and full backpay. *Hartman Luggage Company*, 183 NLRB No. 128; *Stewart Hog Ring Company, Inc.*, 131 NLRB 310, 313.

be computed on a quarterly basis in the manner established by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and including interest at the rate of 6 percent per annum in the manner set forth in *Isis Plumbing & Heating Co.*, 130 NLRB 716.[37]

## ORDER

Upon the basis of the foregoing findings of fact and conclusions of law and the entire record, and pursuant to Section 10 (c) of the Act, it is hereby recommended that the following Order be issued.[38]

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[37] "Reinstatement is the conventional correction for discriminatory discharge." *N.L.R.B. v. International Van Lines*, 405 U.S. 953; but here, since the Respondent ceased doing business on September 22 when Vari-Care took over the Respondent's operations, the "conventional correction" may not be accommodated because the Respondent may no longer be an employer of employees. Thus, the discriminatees, at this stage of the proceedings, are left without the likelihood of an offer of reinstatement from the Respondent. Their predicament in this respect has been caused by the Respondent's misconduct and through no fault of their own. They have lost wages and will continue to lose wages until such time as they find substantially equivalent employment. The Respondent has not only caused the loss of the discriminatees' jobs but the loss of the wages which they would have earned had they been working for the Respondent until September 22 and the additional loss of the wages which they would have earned after September 22 until such time as they would have found substantially equivalent employment. Effectuation of the policies of the Act demands that the discriminatees be "as nearly as possible" countervailed, for the appropriate remedy requires "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." *Phelps Dodge Corporation v. N.L.R.B.*, 313 U.S. 177, 194. Since the "as nearly as possible" remedy in the instant case can not be attained unless it provides for full restoration of backpay, including the backpay which may accrue after September 22, it is recommended that the backpay to be paid by the Respondent be awarded to each discriminatee, commencing on March 11 and continuing thereafter until such time as the discriminatee is gainfully employed in a substantially equivalent position to that in which he or she was employed by the Respondent. In this regard, it is significant that by the reason of the Respondent's misconduct, the discriminatees' chance of employment with Vari-Care, Inc., was frustrated.

[38] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations

The Respondent, Fairview Nursing Home, its officers, agents, successors, and assigns and its owner, Esther J. Johnston, her agents, successors, and assigns shall:

1. Cease and disist from:

(a) Discouraging concerted activities of its employees or membership in the Public Employees Organizing Committee or any other labor organization by unlawfully discriminatorily discharging any of its employees, or by unlawfully discriminating in any manner in respect to their hire and tenure of employment or any term or condition of empolyment in violation of Section 8 (a) (3) of the Act.

(b) Unlawfully interrogating its employees regarding their union activities.

(c) Unlawfully spying on its employees' union activities or creating an impression of surveillance of its employees' union activities.

(d) Unlawfully threatening employees that they will be discharged if they sign union authorization cards.

(e) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of their right to self-organization to form labor organizations, to join Public Employees Organizing Committee or any other labor organization, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of mutual aid or protection as guaranteed in Section 7 of the Act, or to refrain from any and all such activities, subject to the union-security requirements of Section 8 (a) (3) of the Act.

2. Take the following affirmative action which will effectuate the policies of the Act:

(a) Offer Ola Veneziano, Edna Avery, Clara Barnett, Margaret Edna Barnett, Maxine Bell, Mabel Black, Bernice

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Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and order, and all objections thereto shall be deemed waived for all purposes.

Bowden, Emma Bryant, Willen Dean Cary, Zollie Culverson, Ruby Carpenter, Nannie Mae Collins, Lucile Cummins, Kathleen Gillian, Willie B. Hall, Dorothy Hartefield, Mamie L. Henderson, Dorothy Hicks, Mattie Hill, Winifred Hudson, Richard Jones, Odesa Carlton, Luvenia Kenerly, Mattie Kennedy, Mary Kate Lanier, Dovie Lee, Imogene Maharrey, Etha L. Martin, Elvira Mason, Dorothy McDaninel, Magnolia Mitchell, Missa Norris, Nettie Peak, Helen Peeler, Willie Posey, Eleanor Reese Mills, Mary Elizabeth Richey, Lutitia Swanson, Andrew Tabb, Addie L. Ward, Etta Lee Wright, Vicki Grammer, and Effie Henderson immediate and full reinstatement to their former positions or ,if such positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, discharging if necessary any employees hired to replace them and make them (and Quenten Oliver Varner) whole for any loss of pay that they may have suffered by reason of the Respondent's discrimination against them in accordance with the recommendations set forth in the section of this Decision entitled "Recommended Remedy."

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this recommended Order.

(c) Post at its premises at the Fairview Nursing Home, Birmingham, Alabama, copies of the attached notice marked "Appendix."[39] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly

[39]In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

signed by the Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER RECOMMENDED that the complaints be dismissed insofar as they allege violations of the Act other than those in this Decision.

Dated, Washington, D.C.

/s/ Lowell Goerlich

Lowell Goerlich
Administrative Law Judge

## APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board, after a trial in which all parties were permitted to introduce evidence, found that we discharged Ola Veneziano, Edna Avery, Clara Barnett, Margaret Edna Barnett, Maxine Bell, Mabel Black, Bernice Bowden, Emma Bryant, Willen Dean Cary, Zollie Culverson, Ruby Carpenter, Nannie Mae Collins, Lucile Cummins, Kathleen Gillian, Willie B. Hall, Dorothy Hartefield, Mamie L. Henderson, Dorothy Hicks, Mattie Hill, Winifred Hudson, Richard Jones, Odesa Carlton, Luvenia Kenerly, Mattie Kennedy, Mary Kate Lanier,

Dovie Lee, Imogene Maharrey, Etha L. Martin, Elvira Mason, Dorothy McDaniel, Magnolia Mitchell, Missa Norris, Nettie Peak, Helen Peeler, Willie Posey, Eleanor Reese Mills, Mary Elizabeth Richey, Lutitia Swanson, Andrew Tabb, Addie L. Ward, Etta Lee Wright, Quenten Oliver Varner, Vicki Grammer, and Effie Henderson unlawfully and that by their discharges we discouraged employees from becoming and remaining members of Public Employees Organizing Committee or any other labor organization.

WE WILL offer the above-named employees (except for Quenten Oliver Varner) their former jobs or, if their jobs no longer exist, substantially equivalent positions and will restore their seniority.

WE WILL pay them any backpay they have lost because we discharged them.

WE WILL NOT discharge any employee for the same reasons for which the Board found that we discharged the above-named employees

WE WILL NOT unlawfully discharge employees for lawfully engaging in union activities or protected concerted activities.

WE WILL NOT unlawfully interrogate any employees with respect to their union activities.

WE WILL NOT unlawfully spy on our employees' union activities or create an impression that we are spying on our employees' union activities.

WE WILL NOT threaten to or discharge employees for signing union authorization cards.

The laws of the United States give all employees these rights:

To organize themselves

To form, join, or help unions

To bargain as a group through representatives they choose

To act together for collective bargaining or other mutual aid or protection

To refuse to do any or all of these things, subject to the union-security requirements of Section 8 (a) (3) of the National Labor Relations Act, as amended.

All of our employees are free to remain, or refrain from becoming or remaining, members of a labor organization.

FAIRVIEW NURSING HOME
(Employer)

Dated ..... By .....
(Representative) (Title)

We will notify immediately the above-named individuals, if presently serving in the Armed Forces of the United States, of the right to full reinstatement, upon application after discharge from the Armed Forces, in accordance with the Selective Service Act and the Universal Military Training and Service Act.

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material.

Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 2102 City Federal Building, 2026 Second Avenue North, Birmingham, Alabama 35203, Telephone 205/325-3877.

(Ref. Appendix No. 6.)

Final Order of Board finds Employees Effie Henderson and Vicki Grammer were also discharged in Violation of the Act.

(Ref. Appendix No. 5, Attachment 3.

In N. L. R. B. Letter dated July 28, 1972,[3] "Moreover, it was concluded that *under the unique circumstances of this case, the discharge of Henderson and Grammer would violate Section 8(a)(1)* even if the L. P. N.'s were supervisors."

(Ref. Appendix No. 7.)

The *unique and only evidence available to the Board* and the Court of Appeals in support of the findings that Henderson and Grammer were also unlawfully discharged follows:

(Ref. Affidavit of Vicki Grammer attached to and made a part of Motion to Remand, and denied by Court of Appeals.)

STATE OF ALABAMA )
JEFFERSON COUNTY )

**AFFIDAVIT**

My name is Vickie Grammer, I am a Registered Nurse, and a former employee of Fairview Nursing Home, where I was employed as an L. P. N., while in training to become a Registered Nurse.

Along with the other employees, I signed a card for the Public Employees Organizing Committee, but I never authorized anyone to file Unfair Labor Charges against the Nursing Home in my name, and I had no prior knowledge that such charges were filed using my name.

In fact, for two or three weeks before the strike I was off from work to study for my final examinations to become a Registered Nurse, and I certainly was not fired by Mrs. Johnston, Mr. Robinson or anyone else for union activity.

When the nursing home was short of nurses due to the labor trouble, Mr. Robinson asked me to return to work at least twice, but I could not because of my examinations to become a Registered Nurse, and for no other reason.

/s/ Vickie Grammer, R.N.

Vickie Grammer, R.N.

Sworn to, before me, this 10th day of September, 1973.

/s/ S. Patrick Robinson

Notary Public

(Ref. page 10 of Board's Brief to U.S. Ct. of Appeals, and pages 4, 5, and 6 of Reply Brief of Employer, and (App. 843, App. 705) (App. 695-715)

(Ref. page 10 of Board's Brief) *"L.P.N. Henderson, watching from a window, saw the employees leaving, threw down her medicine key and said to Diliberto "Here it's yours, I'm gone with them".* (App. 843, App. 705) (App. 695-715)

Q. "How far is it from the nurses station down around the corner and down the corridor into the lobby area? the best estimate.

A. 75 feet.

Q. There is one corner around from the nurses station down the corridor past several rooms and then around another corner into the lobby area?

A. Yes." (App.696)

Judge: *They came up the steps from the front of the building?*

The witness: Yes sir.

Q. Where do employees normally come in when they are coming to work?

A. I think most of us always come in from the back entrance where —

Q. Near the time clock?

A. Yes." (App. 704, 705)

Q. And when these employees came down and went down laughing and talking past the corridor, didn't they pass out of your sight and hearing from where you were?

A. Yes.

Q. Now, Mrs. Effie Henderson was present with you at this time?

A. Yes, sir. She was at the station.

Q. Was there any conversation between you and her at this time?

A. Nothing except she was still reassuring us to begin with and then she was watching out the window in the medicine room and when she seen all the group out she just threw the medicine keys down and said, here, its your. I'm gone with them.

Q. She said, here its yours. I'm gone with them. Meaning she turned it over to you?

A. She threw them on the counter. I got it.

Q. Did she leave thereafter?

A. Yes, she went on out the door with them.

Judge: Q. Who is this?

The witness: A. Mrs. Henderson.

As this record clearly establishes, Effie Henderson *walked out and abandoned her employment, along with her fellow strikers.* Henderson could not possibly have heard the alleged remark of Mrs. Johnston concerning union cards, participated in the plan for the walkout or strike, and joined the walkout when the strike plan was executed on March 11, 1972.

Therefore, Petitioner represents and shows to the Court that the Board's decision that Effie Henderson and her fellow-strikers were discharged by the employer in violation of Section 8 (a) (1) and 8 (a) (3) of the Act is gross error.

(Ref. (App. 743)[1] and p. 6 of Reply Brief)

> *Judge: "Its more reasonable to conclude that the employees got to the point where they decided we are going to take the company on and marched in on the 11th of March and decided they were going to strike. That's what I thought."*

Ah, there's the truth! I knew we would find it in the record somewhere.

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[1]This Court, of course, has often recognized the universally accepted rule that "credibility resolutions are peculiarly within the province of the (Administrative Law Judge) and the Board and entitled to affirmance *unless inherently unreasonable or self-contradictory." N.L.R.B. v. Standard Forge and Axle Co.*, 420 F. 2d 508, 510 (C.A. 5, 1969); *N.L.R.B. v. Aclang, Inc.*, 466 F. 2d 558, 563 (C.A. 5, 1972). (Ref. page 28 of Board's Brief.)

## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Supplemental Appendix to Petition for Writ of Certiorari has been served on Hon. Elliott Moore, National Labor Relations Board, Washington, D.C. 20570, this 1st day of May, 1974, and three (3) copies of same to the Solicitor General, Department of Justice, Washington, D.C. 20530, by first class mail.

S. PATRICK ROBINSON
*Attorney for Petitioner*

# In the Supreme Court of the United States

OCTOBER TERM, 1973

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NO. 73-1559

FAIRVIEW NURSING HOME, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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1. The Board found that, during a union organizing drive between January and March 1972, petitioner violated Section 8(a)(1) of the National Labor Relations Act by threatening its employees with discharge for participating in union activities, and by engaging in, and creating the impression of, surveillance of those activities (A. 846-848, 865-866).[1] The Board also found that petitioner violated Sections 8(a)(3) and (1) of the Act by discharging employee Ola Veneziano, whom it suspected was the "head of the Union" (A. 841, 851; 242), and by discharging, on March 11, 1972, 43 employees who had signed union authorization cards (A. 849-850, 851).

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[1] "A." references are to the printed two-volume appendix to the briefs filed in the court below.

The Board's order requires petitioner, *inter alia*, to reinstate the discriminatorily discharged employees, with backpay. If reinstatement is not possible, the order requires petitioner to pay backpay to those employees until they obtain substantially equivalent employment (A. 852-853, n. 37, 866).

On December 12, 1973, the court of appeals summarily enforced the Board's order (Pet. App. 18). On February 25, 1974, the court granted petitioner's motion to supplement the record (Pet. App. 22).[2] But, on March 11, 1974, the court denied its petition for rehearing (Pet. App. 21), and, on March 19, 1974, its motion for leave to file a second petition for rehearing.

2. Petitioner contests the Board's statutory jurisdiction, raises several procedural contentions, and questions the propriety of the Board's remedial order and the sufficiency of the evidence supporting the Board's unfair labor practice findings. None of petitioner's contentions presents an issue warranting review by this Court.

(a) Petitioner contends that the court of appeals erred in permitting its enforcement decree to stand notwithstanding that the additional evidence which the court had included in the record "clearly reveals that the Decision and Order of the National Labor Relations Board is no longer supported by credible evidence of the Record" (Pet. 3). But, the additional evidence was irrelevant to the Board's unfair labor practice findings. The bulk of the evidence is designed to show that the employees who were discharged on March 11, 1972, may have provided proper grounds for discharge by reporting for work late or by striking to force the reinstatement of lawfully discharged employees. However, the facts, as found by the

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[2]The court, on November 23, 1973, had denied petitioner's motion to remand the case to the Board to adduce additional evidence.

Board (A. 849-850), show that the employees were not discharged for these reasons, but because they had signed union cards.[3]

It is not relevant to this proceeding whether Public Employees Organizing Committee, which originally organized petitioner's employees, was defunct or replaced by another union (see A. 839, n. 6) because the Board's order does not confer representative status, upon, or require petitioner to bargain with, any particular labor organization.

(b) Petitioner errs in asserting (Pet. 9) that there was no basis for the Board's assumption of jurisdiction. The Board based its assertion of jurisdiction on the undisputed facts that petitioner, a licensed nursing home, "received gross revenues in excess of $400,000, $86,000 of which were derived from Medicaid payments by the Federal Government," and purchased goods at the approximate rate of $1,400 annually from an Alabama supplier who purchased them directly from outside the state (A. 838; 10-11, 19). These facts were a sufficient basis for Board jurisdiction under established principles. *National Labor Relations Board* v. *Reliance Fuel Corp.*, 371 U.S. 224, 226-227. See, also, *National Labor Relations Board* v. *Aurora City Lines*, 299 F. 2d 229, 231 (C.A. 7); *Von Solbrig Hospital, Inc.* v. *National Labor Relations Board*, 465 F. 2d 173, 174 (C.A. 7).

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[3]Moreover, the protest of a lawful discharge is activity protected by Section 7 of the Act. See *National Labor Relations Board* v. *John S. Swift Co.*, 277 F. 2d 641, 646 (C.A. 7).

(c) On no firmer footing is petitioner's complaint that the Administrative Law Judge improperly denied its motions to sequester witnesses (Pet. 6-9), to continue the hearing (Pet. 4), and to dismiss the proceeding (Pet. 4-5). The disposition of these matters rests largely in the discretion of the trier of fact. Moreover, even if error were committed, petitioner has made no showing of prejudice. It is long settled that "[h]e who seeks to have a judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted." *Palmer* v. *Hoffman,* 318 U.S. 109, 116; *National Labor Relations Board* v. *Seine and Line Fishermen's Union of San Pedro,* 374 F. 2d 974, 981 (C.A. 9), certiorari denied *sub nom. Biazevich et al., dba M.V. Liberator, et al.* v. *National Labor Relations Board,* 389 U.S. 913.

(d) Petitioner's challenge to the Board's evidentiary findings (Pet. 11-15) relates primarily to the judge's credibility resolutions. Those resolutions are fully explained in his decision (A. 839, n. 7, 841, n. 8), and are reasonable. Contrary to petitioner's assertion (Pet. 11-12), the fact that the judge may have credited General Counsel witnesses where the testimony was in conflict "[does not] impugn the integrity or competence of a trier of fact." *National Labor Relations Board* v. *Pittsburgh Steamship Co.,* 337 U.S. 656, 659.

(e) Finally, petitioner contends (Pet. 12) that its backpay liability should have been terminated after September 22, 1972, when it allegedly ceased business operations and leased its property to a New York

company. Since petitioner failed to raise this objection in its exceptions to the Board, it is precluded, under Section 10(e) of the Act, 29 U.S.C. 160(e), from raising that objection before this Court. *Marshall Field & Co.* v. *National Labor Relations Board,* 318 U.S. 253, 255-256. In any event, the fact that petitioner may have ceased operations would not necessarily end its backpay liability. See *Golden State Bottling Co.* v. *National Labor Relations Board,* No. 72-702, December 5, 1973, sl. op., p. 18: "With respect to the offending employer himself, it must be obvious that it cannot be in the public interest to permit the violator of the Act to shed all responsibility for remedying his own unfair labor practices by simply disposing of the business. If he has unlawfully discharged employees before transferring ownership to another, he should at least be required to make whole the dischargees for any loss of pay suffered by reason of the discharges until such time as they secure substantially equivalent employment with another employer," quoting from *Perma Vinyl Corp.,* 164 NLRB 968, 970.

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

PETER G. NASH,
*General Counsel,*
*National Labor Relations Board.*

JUNE 1974.

SUPREME COURT, U. S.

FILED

NOV 8 1974

MICHAEL RODAK, JR., CLE

IN THE

# SUPREME COURT OF THE UNITED STATES

NO. 73-1559

FAIRVIEW NURSING HOME,

*Petitioner*

VS.

NATIONAL LABOR RELATIONS BOARD,

*Respondent*

## PETITION FOR RE-HEARING

S. Patrick Robinson
*Attorney for Petitioner*
4917 N. Bay Dr.
Panama City, Florida 32401

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 73-1559

FAIRVIEW NURSING HOME,

*Petitioner*

VS.

NATIONAL LABOR RELATIONS BOARD,

*Respondent*

## PETITION FOR RE-HEARING

Comes the Petitioner Esther J. Johnston, by and thru her Attorney, and respectfully requests a Re-Hearing on her Petition for Certiorari and submits herewith the following grounds and excerpts from the Record together with the authorities thereto pertaining.

1. The National Labor Relations Act as amended (61 Stat. 136. 73 Stat. 519, 29 U.S. Code Sec. 151 et seq.) does not authorize the Actions and Decisions of the Board and the U.S. Court of Appeals for the fifth Circuit in the Case at Bar. (Ref. N. L. R. B. V. Burns International Security Services, Inc. et al Burns International Security Services Inc. et al V. N. L. R. B. 406. U.S. 272, 92 Sup. Ct. 1571, 404. U.S. 822, 92 Sup. Ct. 559.)

What is not provided by the law cannot be supplied by fabrication. Your Petitioner does not seek the slaughter of any of the N. L. R. B.'s Sacred Cows, but prays that this Honorable Court will look Closely into the eyes of this animal to see that it isn't real. The Reviewer of the record will observe the reflections there of the substitution of fiction for fact, and Board theory for the Law. Clearly, it is all done with Mirror's.

U. S. C. 29 §§ 160

No order of the Board shall require the Reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

U. S. C. 29 §§ 157 (Note 114)

A total strike is a concerted activity protected against employer interference, but deliberate slow-downs and walkouts by employees to exert pressure on employer to accept Union's bargaining demands are unprotected concerted activities, and employer is free to discharge participating employees for their unlawful disloyal tactics. N. L. R. B. Vs. Blodes Mfg. Corp. C. A. Ark. 1965 344 F. 2nd 998.

**CROSS - EXAMINATION OF WITNESS CLARA BARNETT (R-415) APP 215 - 216.**

Q Is it not a fact that you have testified here that you said, I signed a union card. Am I fired?

A That's what I told you.

Q Is it not a fact that I said, no, go back to work?

A You did.

MR. ROBINSON:

That's all. Thank you.

MR. COHEN:

Nothing further, Your Honor.

JUDGE:

You are excused.

(Witness excused.)

Mr. Cohen, what's your theory with respect to why I should find that this witness was discharged?

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MR. COHEN:

I don't think — I know of at the moment at least one

more, maybe several more in the same classification who were neither there on the morning of March 11th when Mrs. Johnston made the alleged remarks or Mr. Robinson made the alleged remarks. It's the theory or the General Counsel's position that throughout this period there was a constant violation of Section 8(a) (1) which included threats to discharge them for signing cards and working on behalf of the Union throughout this entire period of January, throughout February and March.

This individual was threatened as well as all the other witnesses in the same classification. It's the General Counsel's position that when these witnesses were informed by other employees of the events and could see for themselves in this case, the other employees down at the end of the line who were obviously not working; that they had in view of the 8(1) and in view of what these employees told them reasonable cause to believe that they had been fired and it would be futile for them to go up there and say I'm here, to say I'm fired.

While these women are not particularly well educated they are having to face an attorney who is the administrator of the home. And they had every reason to believe that going up there would cause a hassle. These girls had all



signed union cards prior to the events of March 11th. They were threatened, they were told, they had been threatened by discharge. They had reason to believe that to go up there would have been futile. They had signed union cards and been informed that Mrs. Johnston had fired everyone who had signed a union card. The belief is for the inference that they would draw, I signed a union card, therefore I'm fired. It would be futile for me to go up there and deal with Mrs. Johnston in view of what had been told them.

We will also present a witness who was not scheduled to work on March 11th. The first time he comes in and meets with any official of the home he is given two checks, his regular pay check and a check up through the last date he worked. This further supports the theory that these individuals were discharged. Here is a man not scheduled to

work on March 11th. The first time he goes up the hill and says nothing to management he's handed two checks that paid him off in full.

Combining this with what the other employees have told him and the circumstances generally as well as the overall 8(1) that's the General Counsel's position.

JUDGE:

Are you claiming that because the Employer informed certain employees that they were discharging union card

218 418 218

signers that it made those employees his agent to inform other union card signers that they were discharged?

MR. COHEN:

I don't think it's an agency question. I hadn't thought through this question. My initial gut reaction would be that it's not in effect an agency. I would hate to have to argue agent. I think the effect is the same in view of the surrounding circumstances, in view of the other 8(1), especially in view of the other threats to discharge.

MR. ROBINSON:

Let me respond.

JUDGE:

One second.

MR. COHEN:

Basically, in effect, they in effect became agents. I wouldn't want to rely and make it an agency argument as such. It's the entire circumstances surrounding that. They had reasons to believe that their actions in returning to work would be futile in view of what they were told, in view of the constant threats, the threats at the staff meetings, the individual threats, that they had signed union cards. They were told that Mrs. Johnston had fired everybody. And yet, then they are told later or

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they are also told that when Mr. Johnston sees them, he also says and reaffirms that they were fired by saying, as the testimony has already shown, he says, you might as well take

the checks. You've been fired anyway. This reaffirms again. I think it's an unreasonable burden in this kind of circumstance.

I'm strictly, at the case in point for an employee, a nurse's aide, an orderly, a laundry maid, a cook to have to force them in effect to deal with an attorney, an administrator on unequal footing. They had all reason to believe that they were, in fact, fired.

JUDGE:

Assuming that they were not, in fact, fired and that would be the finding in this case would it then be incumbent to consider that they are unfair labor practice strikers?

MR. COHEN:

I think so. If you reject the position of the General Counsel which basically the argument is constructed discharge of these individuals; in this circumstance, well, you can't leave them in a position of limbo. They would have to at that point become unfair labor practice strikers who would not return to work in view of what took place that morning. It was a direct discharge of employees for



engaging in union activities.

JUDGE:

I think it that you are convinced that your prima facie case would establish in respect to this witness that she by her actions on the 10th of March, she did not quit or resign.

MR. COHEN:

No. The 11th of March. She considered herself when informed by fellow employees of management's actions in view of the threat directly made to her, the staff meetings where these threats were made, and in view of the fact that she signed a union card, she considered herself fired.

JUDGE:

Would you say that the Respondent by the fact that she had not appeared for work could rely upon the proposition that she had voluntarily quit?

MR. COHEN:

I think no in these circumstances. If the General Counsel's witnesses concerning the morning of March 11th are accredited. Obviously if they are not accredited the case crumbles.

JUDGE:

I have no alternative in a prima face case.

220 421 221

MR. COHEN:

The employees who did not appear that day were not scheduled to appear that day and who did not show up on the first scheduled shift. I think it's incumbent upon them in these circumstances for the Respondent to notify the employees, you must return to work. It would have been no great hassle. We've already seen testimony that Mrs. Johnston at various times called employees at their home and said, can you come in on your off day. Can you come in at a different time.

I think in these circumstances it would have been incumbent upon Respondent in view of what took place on the morning of March 11th and in the afternoon of March 11th to get in contact with these employees and to tell them to be at work by such and such for a regular shift or be discharged or to face possible discharge; if he's claiming that they were. I don't know what the position is. They quit or have failed to come back. It's incumbent--

JUDGE:

You claim the duty was on the Respondent to act, to request the employees to come back.

MR. COHEN:

I think so. Where the employees have every expectation that any further action on their part is futile.

221 422 222

The responsibility then shifts and these very limited

circumstances –

JUDGE:

Do you have any evidence which will support an offer of the employees who you alleged have been discharged having offered to go back to work?

MR. COHEN:

I know of no offer by employees or of any action by Respondent concerning their return to work. I believe things ceased as of 3:30 or whatever on March 11th as far as we are concerned.

JUDGE:

Mr. Robinson, I'll hear you now.

MR. ROBINSON:

I have particularly –

JUDGE:

You understand, Mr. Robinson, that at this point in the case I am required to view the General Counsel's case from the best flight in his favor. Well, I might find that he does not have enough evidence to establish what he claims by propounderance of the evidence anyway. I will hear you at this point.

MR. ROBINSON:

Thank you. We followed the unique theory present by the Government's Counsel and noted particularly that he does identify it as a theory. That he has stated that the



employees knew that every act on their part is futile. The only act that was ever asked of these employees, the evidence will demonstrate, just to work eight hours for eight hours pay, nothing else. He cites about worrying about an unreasonable burden put on the witnesses. It's obvious he's also worried about unreasonable burden put on the General Counsel of proving his case. He's been unable to do this so far.

He also would like the Court to accept a constructive discharge that anyone could tell anyone else that they are discharged when the facts will show that we were presented

with a nursing home with 150 sick and aged patients and 150 endangered of starvation and death. We were happy to have anyone and everyone to work. It shows even voluntarily by these good ladies who have testified, they were asked to go on to work; even the last lady said, her comment although questionable and subject to credibility tests, well, she did say that even in this testimony of me saying I signed a union card, am I fired. She was told, no, go back to work.

The ladies who have testified earlier, Mrs. Kenerly and Mrs. Lanier, yesterday, before the rehearsal in the interim period by parties and parties unknown came back with a slightly modified story. The first lady said, affirmatively

222 424 223

they were told to go on back to work by me the administrator who means business and can carry out his instructions to go on and go back to work.

Affirmatively the next lady said, she said, go on, go on, go back to work. But he was smiling. I don't know whether he meant it or not. I don't smile very much but I try occasionally. The testimony diminishes from then. Then he comes up this morning with witnesses. They've got to tell the truth. They are under oath. But they are colored a little bit. They'll say, yes, he came down and gave us our checks and he said, but you are all fired. That insults the intelligence of any administrator yet alone any lawyer.

The simplicity of the matters was that I had 40 believed to be friends down there in the hot sun. When I walked down to carry their checks, hoping that some of them would come back up the hill and work for me. The evidence will show that one of them did. The evidence will show that he has since been threatened, cursed, beaten but nevertheless he did come back and work.

The evidence will show that the parties, they have been previously identified for misconduct, will not be eligible for reinstatement. The evidence will show that the parties who were first on the picket line were not included in the Complaint because the General Counsel's own investigation determined that they were not a subject of

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or a recipient of any misconduct or unfair labor practice.

The General Counsel's own admission, one out of seven of his original Charging Parties remain in the Complaint. The other seven have faded away. None of them are present because they didn't have a case of law in fact or in truth. It's an attempt to fabricate constructive theory and constructive discharges. They've told me I've been fired a couple of times in my life but never constructively. It was always the boss saying you're fired. In this case he would have the Court believe that you can spread by word of mouth, telephone or conversation to numerous parties that, no need going to work, you're fired. Any thinking person that wasn't afraid of the collective act of others would say, my job is important to me. I will find out from the boss.

Those persons are automatically excluded from being entitled any consideration as far as the failure to work and as far as any unfair labor practice charge by the Employer goes.

Secondly, the Government's Counsel has stated that as far as he is concerned the whole thing is over with at 3:30 on March 11th. Mr. Cohen was so young and naive, he would realize the whole thing just started at 3:30 on March 11th. That's when the hardships and burdens were

224 426 225

brought upon my client. That's when the patients suffered. And these people failed and refused to work. And any and every one that did come back to work were given their jobs back.

The charge says they were unlawfully fired for union activities which the evidence will show is falsely charged against my client. The second line of the same charge says and they refuse to reinstate them. The testimony to be offered will give light to that. They were offered reinstatement along the line each and everytime they were to communicate with the Employer.

So, the truth of the matter is that the majority of these present were mislead, misinformed and misguided and are now being encouraged to mistestify.

MR. COHEN:

I won't defend my naivete, my being naive.

JUDGE:

Excuse me. I didn't hear what you said.

MR. COHEN:

But I do take great exception to being accused of fabricating facts, of in effect perjury.

JUDGE:

He was referring to your witnesses and not to you, I'm sure. He wasn't referring to you personally.

2. The N. L. R. B. has unlawfully applied it's successorship Doctrine to the Case at Bar, including this Petitioner and her successors or assigns in the Board's Order for Reinstatement and back pay, contrary to current decisions of this Court, and in conflict with the Board's Administrative Trial Judges' Commitment to Counsel for all parties in the Record.

"The application of the Successorship Doctrine is not authorized by the Labor Management Relations Act."

"I am unwilling to follow the Board down the Successorship road since I believe to do so would substantially undercut the principle of free choice of Bargaining Representatives by the Board." N. L. R. B. V. Burns International Security Serivces, Inc. et al Burns International Security Services Inc. et al V. N. L. R. B. 406. U.S. 272, 92 Sup. Ct. 1571 404. U.S. 822, 92 Sup. Ct. 559.

**(R. 829 APP. 547)**

MR. COHEN:

The only thing General Counsel would like to add, after – at the chamber of discussion, that we feel that the new tenants in any decision rendered by your Honor should be at least served if not officially served as a party, at least sent a copy of the decision as an interested individual.

JUDGE:

The way the matter stands, they are not a party to this proceeding. And they will not be served with a copy.

MR. COHEN:

Fine, fine.

MR. ROBINSON:

As a courtesy to counsel . . .

JUDGE:

The matter which Mr. Longshore raises if the parties all agree that that shall be deferred to a compliance proceeding I will issue only the usual order and you can litigate whether or not the back pay should be cut off or whether reinstatement should be required at that time.

MR. LONGSHORE:

That's my position.

547 830 548

JUDGE:

Is that agreeable to you, Mr. Robinson? Is it?

MR. ROBINSON:

We feel we are not in a position to make the Trial Judge's decision. We disclosed all information we have at this hearing. We do have one other thing. If I may proceed a moment, –

MR. COHEN:

Are we finished with this issue? That's always been General Counsel's position. That this is strictly a compliance matter. And apparently, it's Mr. Longshore's opinion and I gather it's probably Mr. –

JUDGE:

If there's no objection I will indicate that the matter in respect to reinstatement and the termination, the determination of the liability for back pay will be referred to the compliance hearing, if there needs to be one.

MR. COHEN:

In view of this I will renew my motion in opposition of the papers in the record. They should be placed in the rejected file.

JUDGE:

I think they are pertinent to this proceeding.

548 831 549

MR. COHEN:

Okay.

JUDGE:

Even though I should defer the matter to compliance I still think the exhibits are pertinent to this proceeding.

MR. COHEN:

Okay

JUDGE:

Anything further?

MR. ROBINSON:

Yes. Counsel –

JUDGE:

Just one second.

Do you understand, Mr. Cohen, that the decision of mine would not be binding upon any party that's not a party to these proceedings unless it should appear that that party is an alter ego of the Respondent?

3. The Board has failed to Comply with the Rules of Civil Procedure as required by the National Labor Relations Act, as Amended.

U. S. C. 29 § 160

"Any such Proceeding shall, so far as practicle, be conducted in accordance with the rules of Evidence applicable in the District Courts of the United States under the Rules of Civil Procedure for the District Courts of the United States. Adopted by the Supreme Court of the United States pursuant to Section 2072 of title 28."

Infringement of Petitioner's right of Counsel by Board's denial of Petitioner's Motion to Separate Witnesses thereby substantially destroying opportunities for Cross-examination of Board's Witnesses by Petitioner's Counsel in violation of Petitioner's Constitutional right of Equal Protection under the Law and the Due Process Clause of the Fourteenth Amendment.

Ever since the prophet Daniel exposed perjury in the prosecution of Susanna by examining each of the witnesses in the absence of the other, it has been the practice of the Courts, on the request of either Counsel, and sometimes on the Courts's own Motion to bar from the Courtroom all witnesses in the case except the witness on the stand. The reason for this practice of course is that one prospective witness should not be influenced by the testimony of another (as made in the instant case). The request for an Order of Separation of Witnesses should be made before any testimony is offered on the trial and the separation of witnesses should continue until the testimony is closed. Even after a witness has testified, he is still bound by the Order, since he may be re-called. The consequences of disobedience to such an Order are possible disqualification from testifying. (Wigmore on Evidence s 1837-42)

4. U. S. C. 29 § 160 (e)

If either party shall apply to the Court for leave to Adduce Additional Evidence, and shall show to the Satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the Hearing before the Board, its Member Agent or Agency, the Court may Order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the Record.

The N. L. R. B. and the Fifth Circuit Court of Appeals has abused its discretion by suppressing from the Record material Evidence offered by Union members, and the police officer on the scene, in support of the Petitioner's position, offered together with reasonable grounds for the failure to Adduce such Evidence before the Board, and presented in the Employer's Motions to Adduce Additional Evidence and Motion to Remand which Motions were denied.

Upon the Court of Appeals subsequent granting of the Petitioner's Motion to Supplement the Record en banc, the Board was lawfully obligated to surrender for the Record "2. the Sworn Affidavits of the employees taken by the Board in the investigation of the Charges, requested by Employer's Attorney during the Hearing, refused by the Board, and

admitting that these several employees, who were discharged, were discharged for good and valid reasons. (R 477-479)

To this day the Board withholds these Affidavits from the Record, and Petitioner submits there can be no lawful review of the Record, when the Record is imcomplete, and presents only the hearsay and conclusions selected by the Board to weave its web of constructive discharges of all Union Card signers, while ignoring or suppressing all documented proof of a voluntary strike or walkout of the former employees of Fairview Nursing Home.

477 743 478

JUDGE:

Correct me if I'm wrong now. Mr. Robinson claims that the employees were not discharged on March 11th but that they came up with the anticipation of being strikers. And I take it what he is attempting to show now is that there were certain grievances which prompted the employees to act in this manner. And one of the grievances was to discharge a couple of employees for cause. And that is what this background of discharges – it's more reasonable to conclude that the employees got to the point where they decided we are going to take the company on and marched in on the 11th of March and decided they were going to strike. That's what I thought.

MR. COHEN:

All I'm objecting to is – I will stipulate with Counsel the names of these six individuals and the date they were discharged. But it is irrelevant as to going in to why they were discharged. I will stipulate that they were discharged and that Respondent contends that they were discharged for good cause.

JUDGE:

I think the reason for the discharges might have been one cause of the employees desiring to put on the

478 744 479

pressure by way of strike. If they were discharged for no reason at all it would be a greater incentive perhaps, to strike than if they were fired for cause. If you want to stipulate to the fact they were discharged and the reason for their discharge I will permit that.

MR. COHEN:

If Respondent, as the witness has just testified I think there were six. I think she discharged four and Mr. Robinson two. Maybe it was the other way around. This witness presumably is going to testify as to her direct knowledge on the individuals that she discharged. She'll give evidence – I don't know what evidence on the ones she didn't discharge. Mr. Robinson isn't going to be a witness and I'm going to be precluded. It will be selective testimony.

JUDGE:

Are you willing to stipulate that the Regional Office made an investigation of these six people and concluded that they were not discharged for discriminatory reasons? I think that would satisfy you, would it not, Mr. Robinson?

MR. ROBINSON:

If he submits therewith the affidavits of the investigation, the sworn affidavits.

MR. COHEN:

Of course, there's no way in the world I'm going to do that.

**UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

FAIRVIEW NURSING HOME,
PETITIONER,

VS:

NO. 73-1919

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT

## MOTION TO REMAND

Comes the Petitioner in the above styled cause and moves, that this Case be Remanded to the National Labor Relations Board to Adduce Additional Evidence set forth herein, together with all other relevant testimony and exibits presented at said hearing, and for grounds for said Motion, herewith represents and shows unto your Honors that: **There is perjury in the Record.** That to affirm the decision of the Board would reward said perjury and do great harm to the Petitioner. That to Remand the Case to the Board to Adduce The Additional Evidence herewith presented would expose the perjury in the Record and reveal the Truth of the Matter in Controversy, and require a different result from the Board's finding in the Case at Bar.

1. That one of the primary issues in the instant Case is "Whether the alleged Union Leader, Ola Veneziano, and others were discharged for Union Activities by the Employer," whereas, **the testimony of Sarah King, her co-worker and fellow member of the Public Employees Organizing Committee was not available to the Employer at the Hearing before the Administrative Trial Judge** for the reason cited in her attached Affidavit No. 1, and which eye-witness Testimony will refute the hearsay evidence credited by the Administrative Trial Judge.

2. That another issue of the Instant Case is "whether the employees received a valid offer of reinstatement by the Employer's Administrator, Robinson, at the time of the 3 P.M. payday on the first day of the dispute in question?" Whereas, **the Testimony of a Police Officer who was present and witnessed the events in question was not available to the Employer at the Hearing before the Administrative Trial Judge** for the reason that his identity was unknown to the Employer's Attorney at the time of the Hearing, and in a metropolitan area of approximately a million people with several hundred police officers, it has required several weeks of research and numerous inquiries to identify and locate the police officer, whose Testimony is set forth in Affidavit No. 2 attached, and which Testimony is absolutely essential to the Record of the Case at Bar, and will prove the Employees were offered reinstatement, if they were fired, which they were not.

3. That a key witness in the Board's Case against the Employer, whose Testimony was credited by the Administrative Trial Judge, has voluntarily come forth and has requested that he be given an opportunity to change his Testimony as set forth in his Affidavit No. 3 attached.

4. Justice requires that these witnesses and all others so willing to testify be heard to expose the perjury in the Record.

5. One of the primary issues in the Case at Bar is "whether or not the Employer engaged in Unfair Labor Practices, and unlawfully discharged numerous employees. Whereas in truth, the former employees were engaged in a voluntary strike to force the re-hiring of six former employees that had been terminated for good cause during January and February prior to the called strike on March 11, 1972 (R. 479-487) and (Res. Exibit No. 4 and G.C. Exibit No. 9). **Unavailable and unknown to the Employer's Counsel at the time of the Hearing before the Administrative Trial Judge were "Hand-bills" printed and circulated by the strikers and dated March 11, 1972 and which verify that the employees reporting to work were informed by their own leaders "that they were fired," and not by the Owner,** Further the handbill refers to the "fired six workers in February", that the Board had ruled to be, in effect, lawful terminations (Ref. Respondent's Exibit No. 4) and declares that, "The Fairview employees are ready and willing to go back to work when they are **ALL** called back. (Ref. Attachment C.)

To allege that this handbill is a strike Notice and belongs in the Record is the greatest understatement since Noah said, "it looks like rain"!

6. Because it interfers with the proper Administration of Justice, the National Labor Relations Board should not suppress evidence that it has a legal obligation to reveal, specifically the sworn Affidavits of its witnesses during the investigation of Unfair Labor Charges, and their Judicial Admissions in the prior Representation Case involving the same parties, particularly when said witnesses gave contrary Testimony on the different occasions. (Ref. Aff. No. 4 and Attach. D.)

That said Judicial Admissions "that the Fairview employees were on strike" were signed and sworn to by the representatives of the strikers and attached to and made a part of the pleadings in said Representation Case, and removed from the Brief of the Employer to the Administrative Trial Judge in the present Unfair Labor Case by the Board. (Ref. Attachments No. 5 and No. 6.) That said Affidavits of the employees were taken by the Board in the investigation of the charges of Unfair Labor Charges, requested by employer's Attorney during the Hearing before the Administrative Trial Judge and refused by the Board. (R. 477-479.)

S. Patrick Robinson
Attorney for Petitioner

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

## AFFIDAVIT

My name is Sarah King, I am employed at Fairview Nursing Home, where I worked on the same floor and same shift as Ola Veneziano. I had promised to and intended to testify at the Hearing of the Fairview Case before the National Labor Relations Board, but I did not show up because my elderly mother had a hemorrhage, and I spent that day with her without notifying Mr. Robinson.

On the night that Mr. Robinson fired Ola Veneziano, Ola had been raising hell all night, including talking loud, cursing about the work and bosses and being terribly loud in the presence of patients and other employees for most of the shift, even though another employee from the next floor and I both asked her to please be quiet. Finally Ola propped herself up in a chair and went to sleep for about two hours during the last part of our shift.

In the early morning Mr. Robinson came in and questioned Ola, me and the Nurse about the disturbance and then fired Ola.

Although I signed one of their P. E. O. C. cards, I told Ola Veneziano, Hazel Porter and Robert Edwards that I would not strike on sick old people in the Nursing Home like they were machines or a factory, and I worked all through the strike, and I'm still working there, and I never authorized anybody to use my name to file charges against Fairview.

_____
Sarah King

Sworn to before me this 18th day of July, 1973.

_____
Notary Public
State at Large

## AFFADAVIT .

My name is Willie Posey, and I want to change my Testimony in the Fairview Case.

When I arrived at Fairview Nursing Home, I was late for work, and about twenty or thirty people were in the lobby talking, and I went past them to the bathroom to change to work clothes, and returned to the lobby, and when I came back to the lobby the other employees were going out the door, and they told me to "come on, I was going right with them, and some of them said go back and get Zellie out of the kitchen and they went in the kitchen and came back with Zellie and they all went outside - about that time the Police came - the Police said it was best for them to go on off the property, and some of the employees asked them if they would come back at 3 o'clock and go up with them to get their pay checks, and the Police promised they would do that. When Mr. Robinson came down about 11 o'clock that morning with our pay checks, they refused them, all but Zellie and said they would come up at three o'clock for them when the Police came. They walked away from Mr. Robinson, and some of the employees yelled out "don't take the checks, we will get them at three o'clock when the Police come." Mr. Robinson just turned around and went back up the hill.

At three o'clock we went back up the hill with the Police, and Mr. Robinson was handing out the checks, and more than thirty of the employees said they wanted their time, they wanted the rest of their pay, and Mr. Robinson said if they would wait a few minutes, he would go back in and see the records and make out their other checks. Mr. Robinson asked the 3 to 11 shift if they was going to go on to work, and they just stood there and didn't answer. Later, Mr. Robinson came out with the rest of the checks and we took them and went back down to the foot of the hill.

I have never heard any of the employees mention a union or union card to Mrs. Johnston, and I have never heard her mention a union or union card to the employees. In fact we were all told not to mention the card or the union to Mrs. Johnston.

Willie Posey

Given under my hand and seal this 16th day of August, 1973.

Notary Public

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

**AFFIDAVIT**

My name is Margaret Barnett. I was employed at Fairview Nursing Home during March of 1972, and when the union people came around to get the union cards signed, we were threatened and told "if we didn't sign the cards we would get our tails whipped and our cars tore up", so I signed the card, but I never authorized anybody to file charges against the nursing home in my name. When I was called to come in an hour late, the employees met at a cafe near the nursing home, and we were told, "we are going to let Mrs. Johnston see what its like not to have any help". I liked my work at Fairview, and the only reason I didn't keep working was I was afraid to cross the picket line so I went along with the crowd and left with the others when some of the employees said "get the others out of the kitchen, we are going".

I remember when we went up at 3 o'clock, Mr. Robinson said for "anybody that wants to - go on in to work," but nobody said anything but they wanted their checks, and when they got their checks, they left.

Margaret Edna Barnett

Sworn to before me this 15th day of October, 1973.

Notary Public

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

**AFFIDAVIT**

My name is Dale Warren, I am a Sargent of the Birmingham Police Department, and have been a Police Officer for eighteen years. I answered several calls to the Fairview Nursing Home during the spring of 1972, and was present when the employees received their pay-day from the Attorney Pat Robinson outside of the Nursing Home right after three p.m.

Mr. Robinson was identified to me as Mrs. Johnston's Attorney and I knew that she was the lady who ran the Nursing Home.

I guess there was about thirty or thirty-five people gathered in front at this time, I was outside in front of the door and Mr. Robinson was on the edge of the parking area in front of me, when the checks were ready in the Office they were brought out to Mr. Robinson. I remember Mr. Robinson asking the employees "to go back to work" at least twice while passing checks out to them and some he called by name and asked them personally when he handed them their check if they were going to come back on their regular shift, especially two who were supposed to work the late shift, and they were just mute, and wouldn't answer, and I never heard one of them say whether they would or wouldn't be back. I remember some of them complaining they weren't getting paid enough, that they had more days coming, and I remember Robinson telling them that he would check their records and if they had more days coming he would see that they got paid for them. After they got their checks they left the Nursing Home area, and some went back to the picket line in front. Answering one of the calls to the nursing home, several people were standing in the door-ways and hall talking, and Mrs. Johnston and one of the nurses were in the office sitting, when we arrived Mrs. Johnston complained about these people blocking the halls and disturbing the patients. Mrs. Johnston came out of the office with the nurse

and she asked them to leave, because they were disturbing the patients. They just stood there, so I told them they could not block exits or halls, and suggested they leave and let it be handled through legal channels, and they left.

_____

Sargent Dale Warren

Sworn to, before, this 17th day of July, 1973.

_____

Notary Public

## EXAMINATION OF MABEL BLACK
### (Attachment to Motion to Remand)

Q. All right, did you talk to Mrs. Johnson or her son or any of the managerial people?

A. I talked to Mr. Robinson is all I talked to on the outside.

Q. Was anything significant said between you and Mr. Robinson?

A. I asked him for my two days. I had two more days coming and he said that they would have to .... we would have to give him time to make out the checks.

Q. All right, you asked him for your final check in other words?

A. Yes, sir.

Q. Does that complete your testimony?

A. Yes, sir.

Q. Does the employer have any questions?

EMP. No, sir.

Conclusion of Mabel Black's testimony . . .

This Petition considered, Petitioner Prays that Certiorari will be granted, the Judgement will be vacated and this case will be Remanded to the Court of Appeals with instructions to the National Labor Relations Board for such further proceedings as may be appropriate in light of Burns International Security Services, Inc. V. N. L. R. B. 406 U.S. 272, 92 S. Ct. 1571, 32 L. Ed. 2d 61, and as provided in 29 U. S. C. s 160 (e).
s

S. Patrick Robinson

S. PATRICK ROBINSON
*Attorney for Petitioner*

## CERTIFICATE OF PETITIONER'S ATTORNEY

The Attorney for Petitioner herewith certifies that the foregoing Petition is submitted in good faith, and not for delay, and assigns grounds in support of its Petition not previously presented in the original Petition for Certiorari.

S. Patrick Robinson

S. Patrick Robinson
Attorney for Petitioner

## Certificate of Service

The undersigned Attorney for Petitioner, herewith certifies that he has served three copies of the Foregoing Petition For Re-Hearing on the Solicitor General of the United States by Special delivery air mail to Solicitor General Department of Justice Washington, D.C. 20530 this 6th day of November, 1974.

S. Patrick Robinson

S. Patrick Robinson
Attorney for Petitioner